

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
DavCo Restaurants, Inc.
Petitioner

Anthony Alessi
Harry Porter
John Sekerak
Thomas Flynn
Robert Saunders
Glenn Cook
For the Petition

Jody Kline, Esquire
Attorney for Petitioner

Martin Klauber, Esquire, People's Counsel
Advocating a Remand

Before: Martin L. Grossman, Hearing Examiner

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Board of Appeals Case No. S-2664
(OZAH Case No. 06-22)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2664, filed on April 7, 2006, seeks a special exception, pursuant to §59-G-2.16 of the Zoning Ordinance, to permit a fast-food restaurant (a Wendy's) on the peripheral grounds of "Westfield Shoppingtown Wheaton" (formerly known as "Wheaton Plaza Mall"). The land is described as Lot N-621, Wheaton Plaza Subdivision, and it is located at 11030 Veirs Mill Road in Silver Spring, Maryland. It is in the C-2 (General Commercial) Zone, and its Tax Number is 13-00983700. The property is owned by "Wheaton Plaza Regional Shopping Center, LLP," (a subsidiary of Westfield, LLC), and leased to Petitioner, DavCo Restaurants, Inc. (Exhibit 9).

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated July 6, 2006, recommended denial of the petition (Exhibit 21). By letter dated July 26, 2006, (two days before the hearing scheduled by the Office of Zoning and Administrative Hearings), the Planning Board for Montgomery County (Planning Board) recommended that Petitioner submit a revised application to the Hearing Examiner for consideration at the public hearing, and that the Hearing Examiner hold a public hearing "and then remand the revised application (including plans) back to the staff and Planning Board for comment." The Hearing Examiner concluded that this procedure would violate Zoning Ordinance §59-A-4.24, which requires 10-days notice of amendments to the petition, and would, at the very least, require a wasteful repetition of the public hearing process. He therefore postponed the hearing and, after Petitioner revised its plans, issued notice of the proposed amendments to the petition (Exhibits 22 and 25).

On October 19, 2006, notice was issued scheduling the public hearing for December 4, 2006. On November 20, 2006, Technical Staff issued a second staff report (Exhibit 28), once again recommending denial of the petition. Petitioner responded to some of the concerns, which had been raised by Technical Staff, in a November 22, 2006 letter to the Planning Board (Exhibit 29(a)). On November 30, 2006, after considering the concerns raised by Technical Staff and others, the Planning

Board voted unanimously to recommend approval of the special exception and the request to waive two parking regulations, as reported in the December 1, 2006 letter of its Chairman (Exhibit 31).

The public hearing in this case took place, as scheduled, on December 4, 2006. The People's Counsel was unable to attend, but he expressed his thoughts in an e-mail to the Hearing Examiner a few days before the hearing (Exhibit 32). No opposition appeared at the hearing; nevertheless, the record was held open to allow Petitioner time to submit revised plans to address concerns raised by Technical Staff and others.

Following a number of amendments to the petition, which were publicly noticed, Technical Staff submitted a "Third and Final" report on March 2, 2007 (Exhibit 62) and an e-mail regarding photometrics on site (Exhibit 63).¹ After one more revision to the Landscape and Lighting Plans, which were again publicly noticed (Exhibits 64 and 65), and a reformatting of the Photometric Plan (Exhibit 66), the record closed on March 19, 2007. It was reopened on April 18, 2007, solely to receive a full size copy of the final floor plan (Exhibit 67(a)), and closed again the same day.

As discussed more fully below, the Hearing Examiner believes that the concerns raised in this case have been sufficiently resolved, and therefore recommends that the petition be approved, with conditions.

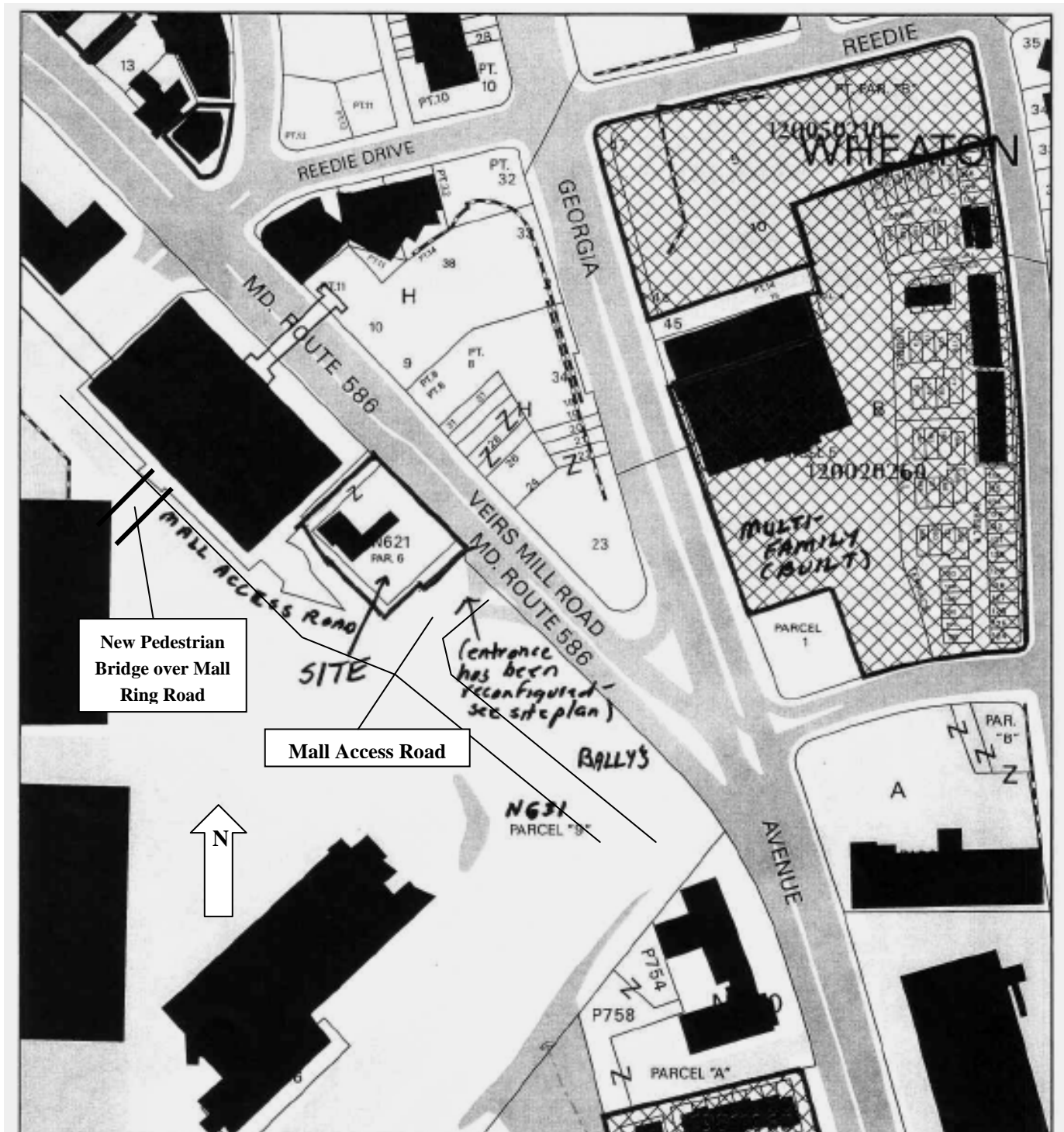
II. BACKGROUND AND ISSUES

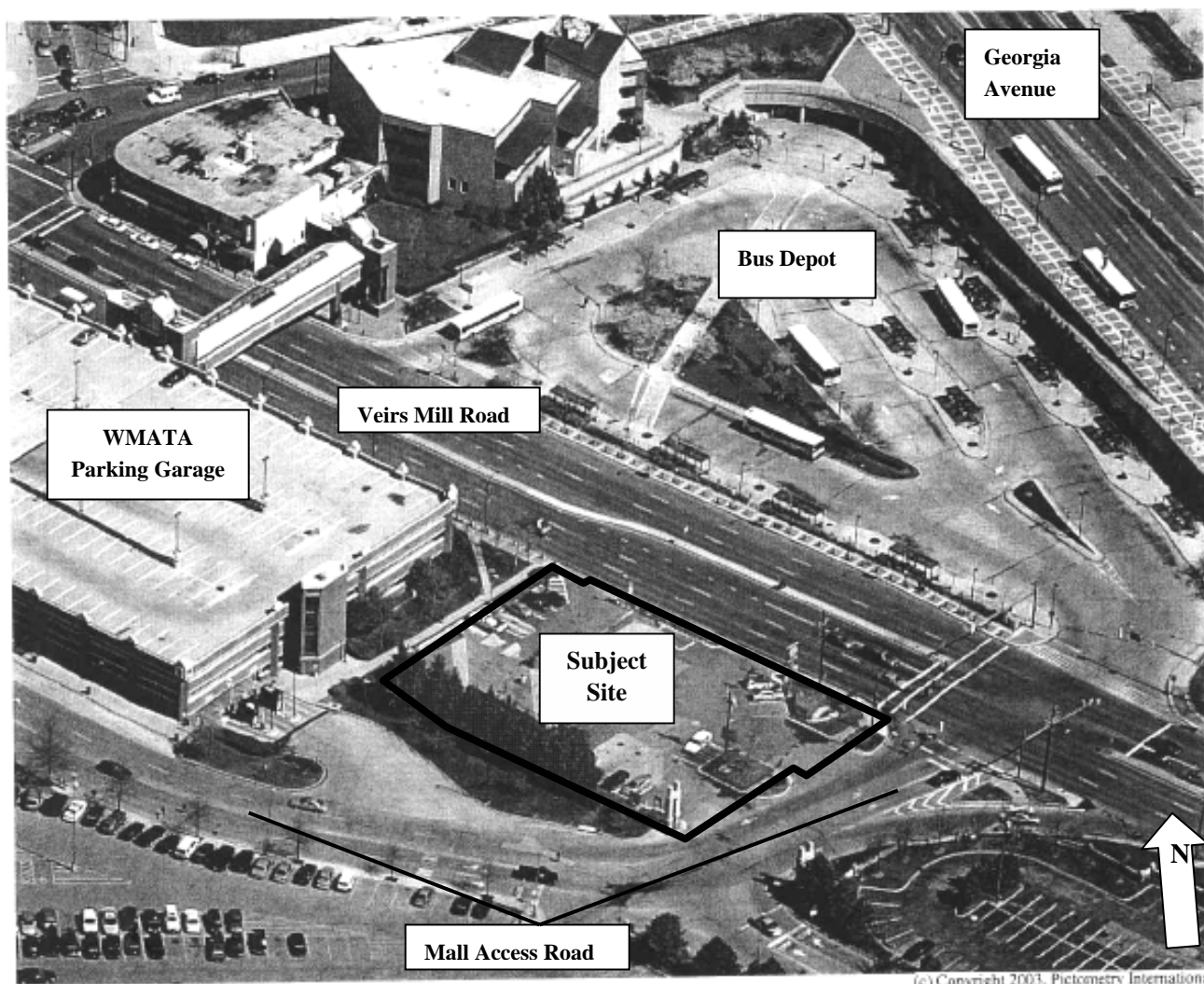
A. The Subject Property and Surrounding Neighborhood

As noted above, the subject property is located at 11030 Veirs Mill Road, Silver Spring, in the C-2 (General Commercial) Zone. The special exception site is on the southwest side of Veirs Mill Road, southeast of the adjacent WMATA parking garage, and across Veirs Mill Road from the bus depot and Wheaton Metro station. It is in the western quadrant of the intersection formed by Veirs Mill Road and the vehicular entrance ("Mall Entrance Road") to Westfield Shoppingtown Wheaton.

¹ The Technical Staff reports are frequently quoted and paraphrased herein.

The intersection of Veirs Mill Road and Georgia Avenue is nearby to the southeast, and to the northwest is Reddie Drive. The site is shown below on a vicinity map and an aerial photo, which were attached to the initial Technical Staff report (Exhibit 21):

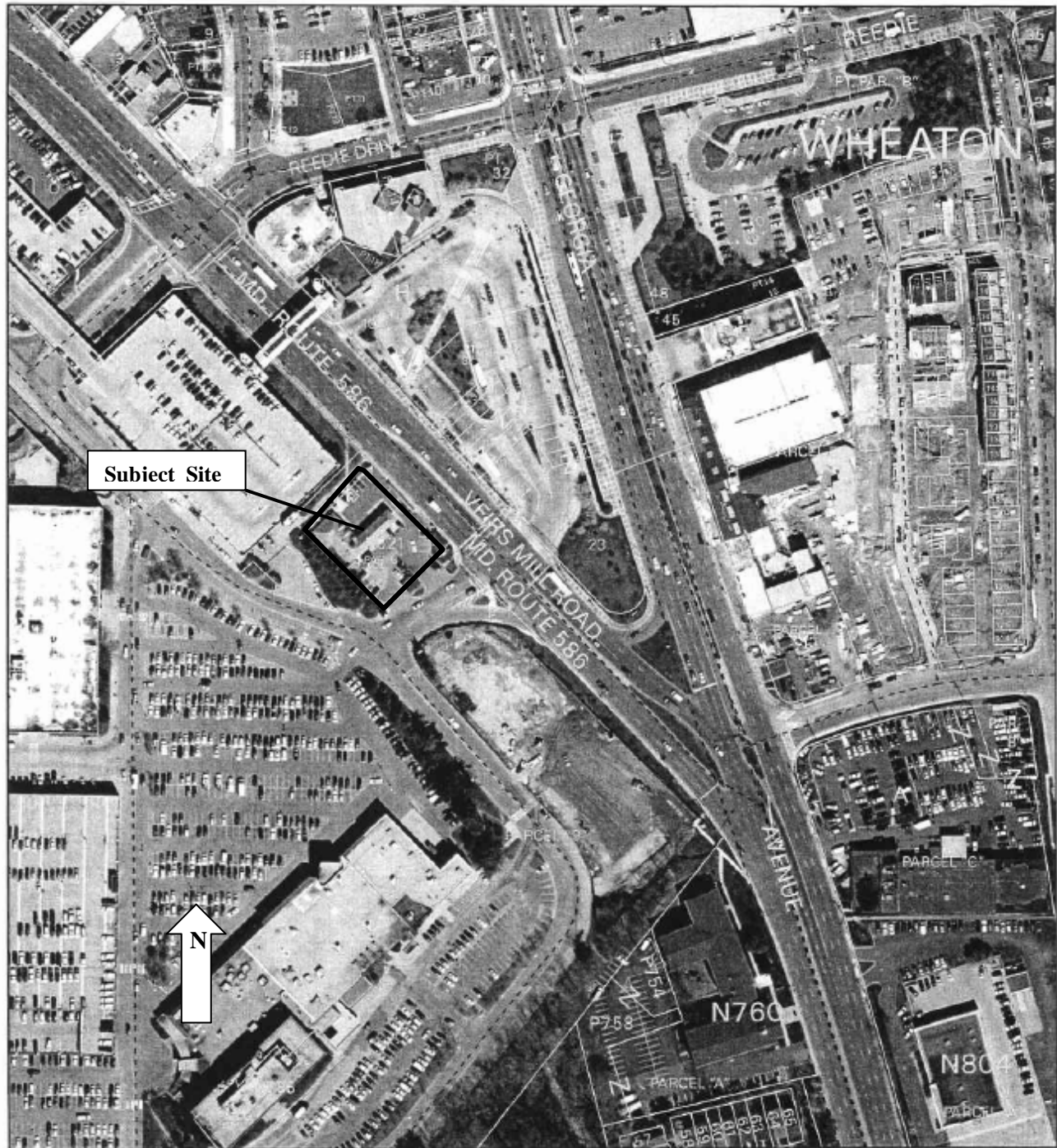




According to Technical Staff, the property comprises all of Parcel 6 (Lot N621) and a small portion of Parcel 9 (Lot N631), Wheaton Plaza Subdivision. The site contains 22,545 square feet, is almost rectangular in shape, and is flat. It has a right-of-way frontage of approximately 165 feet along Veirs Mill Road, and 134 feet along Mall Entrance Road. The property was formerly occupied by a gas station, but that use has been removed, and the lot is now fenced in.

The subject site is located within the area covered by the *Comprehensive Amendment to the Sector Plan for the Wheaton Central Business District and Vicinity* (approved and adopted September 1990). Although the property is within the Wheaton CBD Policy Area, it is not actually within the Central Business District ("CBD") itself. The CBD boundary runs along Veirs Mill Road, and hence

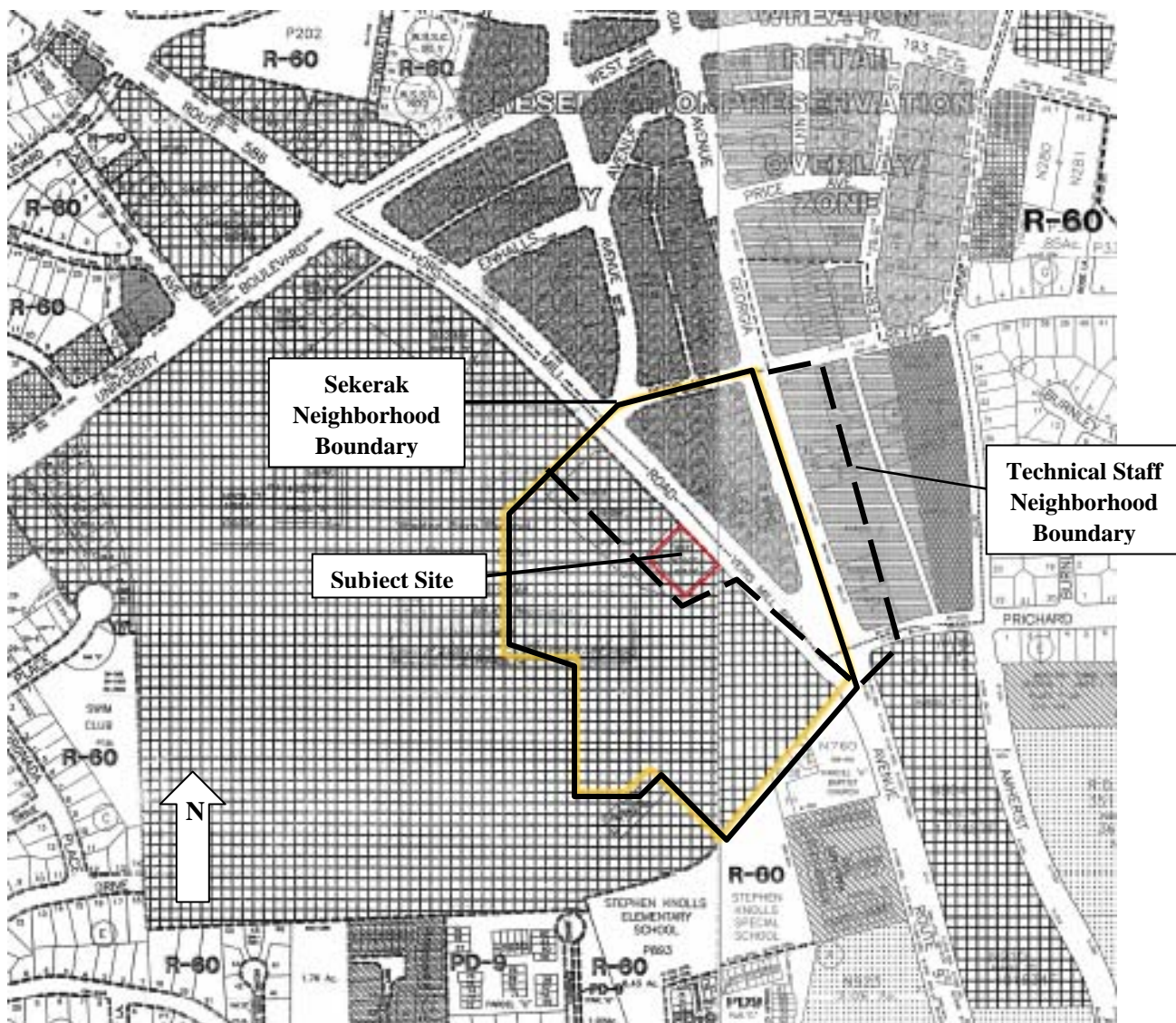
² Technical Staff notes that the property is also not within the Wheaton Retail Preservation Overlay Zone, which covers a portion of the Central Business District to the north of Reddie Drive.



Map downloaded on July 03, 2006 at 10:53 AM. | Site located on base sheet no. 214NW07 | Date of Orthophoto: April 2004 | Orthophoto images licensed from VARIOUS LLC.

Technical Staff defined the neighborhood as the area bounded by Reddie Drive to the north; the mixed-use properties fronting on the east side of Georgia Avenue to the east; the intersection of Veirs Mill Road and Georgia Avenue to the south; and the commercial properties fronting on the west side of Veirs Mill Road to the west.

Petitioner's land use expert, John Sekerak, disagreed, arguing that the area affected by the proposed special exception was limited by Georgia Avenue on the east, and did not include the mixed-use properties to the east of that highway. Tr. 82-85. His proposed general neighborhood, as shown on Exhibit 39, is depicted with a solid line. The area included by Technical Staff is depicted with a dashed line (It extends further to the east, but not as far to the west):



Although the distinction between the two neighborhood definitions is not critical, the Hearing Examiner agrees with Mr. Sekerak, in that the proposed Wendy's is unlikely to have an impact on the properties across Georgia Avenue, either visually or from traffic flow. Two major roads and a bus

depot intervene between the two areas. Moreover, a high density office complex is planned for above the bus depot, which will further screen the mixed-use buildings to the east of Georgia Avenue from the subject site. Tr. 19, 86-88.

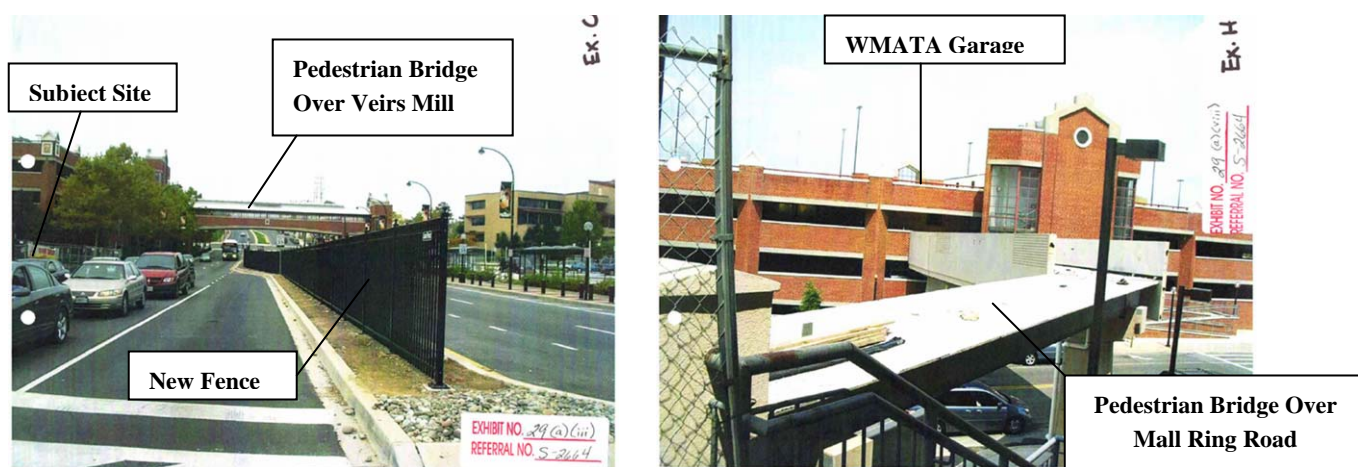
Technical Staff described the area surrounding the subject site. Exhibit 21, p. 4. In the triangle of land bounded by Reddie Drive, Georgia Avenue, and Veirs Mill Road are a low-rise commercial building, the Wheaton Regional Services Building, part of the Wheaton Metro Station³ and a WMATA bus depot, all on land zoned CBD-2. Along the west side of Veirs Mill Road are commercial properties. These include the subject site, the adjacent WMATA parking garage to its north, landscaping immediately abutting the subject site to the southwest, and the Westfield Shoppingtown Wheaton to the west of the subject site, all on land zoned C-2. The WMATA garage is connected to the bus depot by a footbridge over Veirs Mill Road and to the shopping mall by a new footbridge over the Mall Access Road (a/k/a the “ring road”). Also to the west of Veirs Mill Road are the newly developed freestanding Bally’s Health Club and parking just south of the subject site across Mall Access Road. Along the east side of Georgia Avenue are mixed uses, including newly developed five-story multi-family buildings, an older four-story office building, part of the Metro Station and surface parking, all on land zoned CBD-3.

Technical Staff also described the road and sidewalk system surrounding the subject site. Exhibit 21, pp. 4-5. The portion of Veirs Mill Road between Mall Entrance Road and Reddie Drive is a six-lane, two-way road, with a median and a seventh lane for turning movements. The portion of Veirs Mill Road between Georgia Avenue and Mall Entrance Road near the subject site is five lanes only, with a sixth lane for left-hand turning movements in the northwest lanes. Veirs Mill Road is classified as a Major Highway, M-13, with a 120-foot right-of-way. The Mall Access Road in the

³ The Metro Station itself is located under Georgia Avenue and is accessed via a tunnel that connects the bus depot on one side to Georgia Avenue to the parking area for the Metro Station on the other side of Georgia Avenue.

vicinity of the subject site has two lanes in either direction and a median. The roadway, excluding sidewalks, is about 50 feet wide. The intersection of Veirs Mill Road and Mall Entrance Road is signalized. The intersection of Veirs Mill Road and Georgia Avenue is also signalized, and both northbound and southbound traffic on Georgia Avenue can turn onto Veirs Mill Road at this intersection. There are sidewalks on either side of Veirs Mill Road.⁴ A number of crosswalks and a footbridge lead pedestrians across Veirs Mill in the vicinity of the subject site. As mentioned above, a new footbridge traverses the Mall Access Road from the WMATA garage to the shopping mall.

Perhaps most importantly, an eight foot tall fence has recently been installed on Veirs Mill Road along the entire median, from Reddie Drive all the way down to the Mall Access Road south of the subject site, to keep people from crossing mid-block. Prior to the fence, there were many pedestrian movements straight across the road in an unsafe manner. Pedestrians must now cross at Reddie Drive, use the pedestrian bridge, or proceed down to the southern Mall Access Road, which is signalized. The shortest distance for customers is to use the pedestrian bridges. Tr. 17-20. The new fence (viewed from the south) is depicted below (Exhibit 29(a)(iii)). Next to it is a photo of the new pedestrian bridge across the Mall Ring Road, viewed, under construction, from the Mall, in Exhibit 29(a)(viii).



⁴ Technical Staff notes that the sidewalks that abut the subject site on both Veirs Mill Road and Mall Entrance Road currently are not designed according to the Wheaton Streetscape requirements, and neither are the sidewalks that abut the Bally's site (south of the subject property) along both Veirs Mill Road and the Mall Entrance Road. The Wheaton Streetscape requirements are found in the Wheaton Central Business District Road Code Design Standards,

Technical Staff reports that there have been two applications for special exceptions within the defined neighborhood, S-32 and S-546, but “they appear to no longer be in place.” Exhibit 21, p. 4. Consequently, there would be no adverse cumulative impact from the addition of the proposed special exception.

B. The Proposed Use

The subject application seeks a special exception pursuant to Section 59-G-2.16 (Drive-in Restaurant) of the Zoning Ordinance to permit:

- A one-story, drive-in restaurant with 2552 square feet of floor area, 917 square feet of which is devoted to a patron area;
- A three-station drive-through operation with one position for an order board, a second for a payment window and the third for a pick-up window;
- Twenty-three parking spaces;
- A dumpster, screened by a three-sided brick enclosure with board-on-board gates;
- Hours of operation: seven days a week from 6:30 am to 2:00 am, with initial hours of operation being from 10 am to 2 am;
- No more than 50 employees, with up to 10 on site at any given time;⁵ and
- Waiver of parking regulations in Zoning Ordinance §§59-E-2.71 and 2.72.

Section 59-A-2 of the Zoning Ordinance defines a “drive-in restaurant” as:

Any place or establishment merchandising or dispensing food or drink at which the customer is served:

- (a) *While sitting in an automobile or other motor vehicle, or*
- (b) *Through an interior or exterior sales window, counter or serving area, and in which a substantial part of the food or drink merchandised and dispensed has been prepared and packaged so as to facilitate its consumption outside the structure in which the food or drink is dispensed.*

issued by the Montgomery County Department of Housing and Community Development and Department of Transportation, April 1990.

⁵ These figures differ somewhat from those in the Technical Staff report. They are based on the testimony of Petitioner’s Project Manager, Harry Porter. Tr. 30-31.

Option (b) is precisely what Petitioner DavCo Restaurants, Inc.⁶ plans for the Wendy's outlet it seeks permission to build and operate on the periphery of the Westfield Shoppingtown Wheaton shopping mall. The architect's vision of the proposed restaurant is shown below in Exhibit 38⁷:

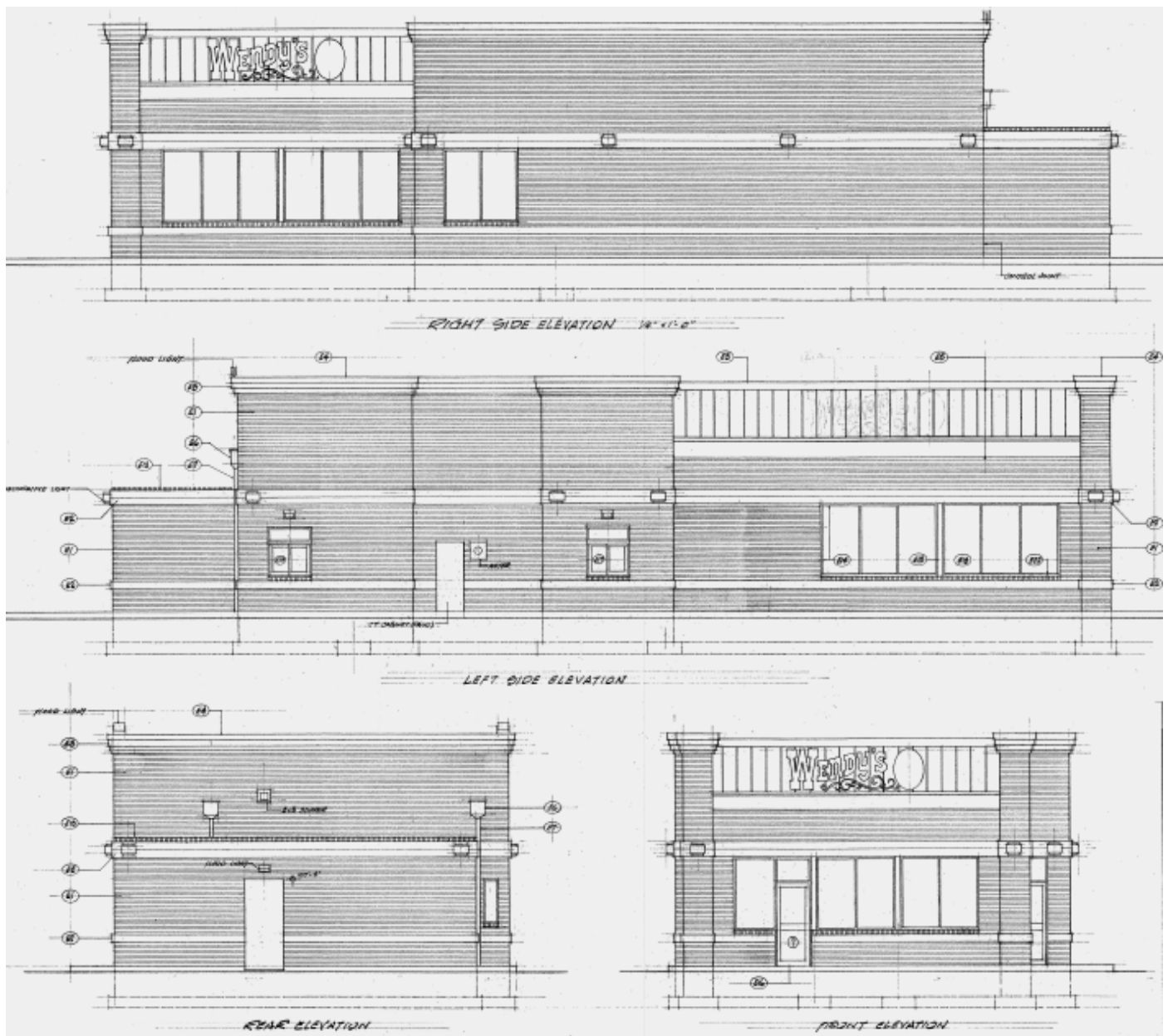


Robert Saunders, Petitioner's architect, testified that the proposed building is a culmination of many, many changes, all brought about by "outside forces" such as the Planning Board and the landlord. On the outside, one of the changes is that the building has grown in height considerably. It's over 20 feet high now to give it the mass and the background it needs. The facia, which used to be yellow, has been mellowed; it's gone to copper, which is very compatible with its surroundings. The building has gone to complete masonry, which gives flexibility in matching surrounding

⁶ DavCo Restaurants has been in business for approximately 30 years, and it is the second largest Wendy's franchisee in the United States. DavCo Restaurants is also the eighth largest restaurant franchisee in the United States, operating approximately 157 stores, with four stores under construction. DavCo operates in Maryland, Northern Virginia and Washington, D.C. DavCo will only build restaurants with a drive-through. It is part of its prototype to have the drive-through and pickup window. The only exceptions to the drive-through prototype are stores within a shopping center, an office building or an airport. DavCo feels that the drive-through serves a community need, and it generates a large portion of sales, including a late night group of customers that couldn't be served without the drive-through restaurant. Tr. 24-26.

⁷ The portion of Exhibit 38 showing the pylon sign has been excluded from this reproduction because Petitioner has removed the pylon sign from the final plans for this project at the request of Technical Staff.

buildings and surrounding neighborhoods; the proposed lighting will accent, but not detract from the building. In Mr. Saunders' opinion, this particular model "is the best we've got right now." It is a very compatible, flexible and attractive building, which will fit well in the context of the surrounding area. Tr. 119-128. The elevations shown below from Exhibit 42 further demonstrate what the building will look like when completed:



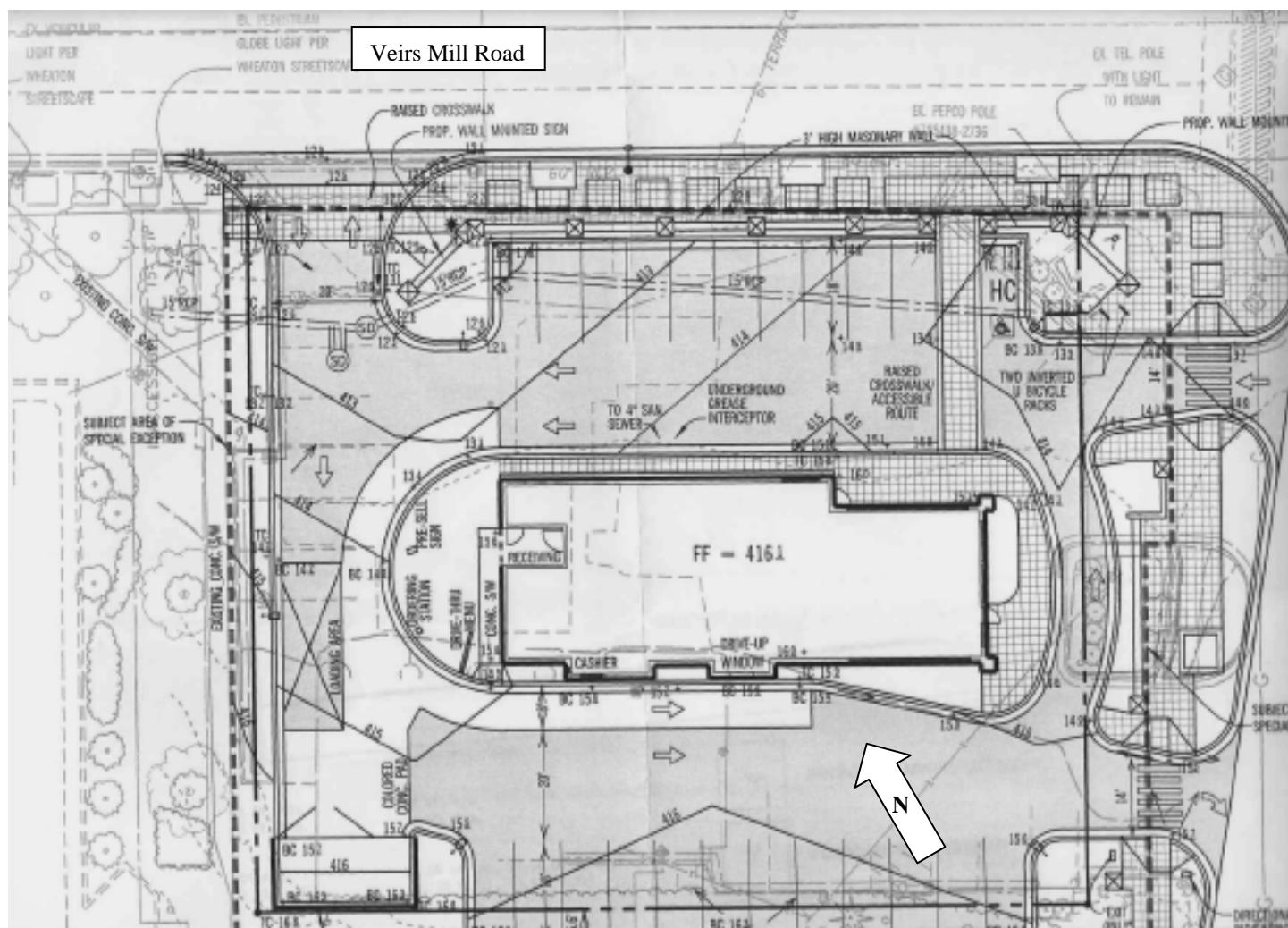
The restaurant's customer entrance consists of two doors, one oriented towards Veirs Mill Road and the other towards the mall entrance road. The restaurant itself would close at 10 p.m., and the drive-through window would remain open till 2 o'clock in the morning, which serves customers returning home from work who want a quick sandwich. According to Harry Porter, DavCo's project manager, DavCo spends a great deal of money advertising late night availability, competing with larger hamburger companies like McDonalds, so being open late at night with a drive-through restaurant is important to Wendy's. Tr. 25-26.

Other features of the proposed restaurant, as recited in the initial Technical Staff report (Exhibit 21, p. 7), include:

- A brick exterior with bands of masonry detailing, substantial glazing, a sculpting ABS fascia system, and accent lighting;
- Special equipment to deal with oils and greases generated by the restaurant, including an underground grease interceptor, a tank within the building to collect cooking oils, an exterior hose connection on the tank, and a "shortening shuttle," which is used by employees to periodically drain the tank into a 55 gallon drum stored in the trash enclosure area for removal by a recycling company;
- ADA compliance in terms of design and numbers of accessible parking spaces;
- An upgraded street environment utilizing and enhancing the Wheaton Streetscape standards, including special brick sidewalk treatments with a variety of colors and textures; a masonry brick wall with contrasting column caps at a height adequate to partially screen vehicles on the site and to provide a suggestion of separation between the public and private realms; extension of the brick wall and sidewalk treatment onto private property by "wrapping the corner;" and the same enhanced sidewalk features on the walkway leading from Veirs Mill Road into the Westfield's Shopping Center; and
- The relocation of the entrance to the restaurant so that it is more visible from the street and from the Veirs Mill Road sidewalk, with the front door located so that it faces the area of the site with the greatest amount of landscaping and the most extensive hardscape features.

Shown below and on the following pages are the final revised plans for the special exception.

The first is the diagram from the final site plan, Exhibit 64(a):



The subject area of the special exception extends a bit outside the property line for Lot N-621, on land also owned by Westfield. On the above diagram, the area of the special exception is denoted by a dashed line, and the property line of the lot is designated by a long line with two dashes, intermittently.⁸

⁸ This extension of the subject site into the neighboring lot is not an issue because the co-ownership of the two lots results in a zoning merger pursuant to *Remes v. Montgomery County*, 387 Md. 52, 874 A.2d 470 (2005).

Below and on the following page are the General Notes, Tract Area Tabulation, Development Standards and Parking Tabulation from the Site Plan.

GENERAL NOTES

1. Subject Area of Special Exception = 22,545 s.f. and includes Net lot area of Parcel 6 (per Plat Book 66 - Plat No. 6037) and Part of Parcel 9 (per Plat No. 21051)
2. Existing zoning: C-2.
3. Boundary & topographic information for site is from a field survey by Greenhorne & O'Mara 04-25-05. Surrounding topographic information is from M-NCP&PC and utility information is from respective companies. Recent improvements to Viers Mill Road entrance to Wheaton Plaza are approximated from field observation.
4. There is no existing forest on site.
5. Water and Sewer categories: W-1 & S-1.
6. The site is within the Sligo Creek watershed (Class I).
7. The site is within the Wheaton CBD & Vicinity Master Plan Area (Planning Area 31).
8. The site is within the Wheaton CBD Policy Area.
9. Soils information is from the 'U.S.D.A., Natural Resource Conservation Service, Soil Survey of Montgomery County, Maryland,' 1995, Plate 24.
400 - Urban Land.
10. There are no streams on site.
11. There are no known rare, threatened, or endangered species on site at this time. An environmental review request was submitted to DNR on June 6th, 2005.
12. There are no known historic or cultural features on site.
13. There were no rock outcroppings or scenic views of note observed on the site.
14. There are no historic buildings or structures on the site.
15. Used fat & oils storage tank will be located either within the service area of the restaurant or in the trash enclosure area.
16. This plan is not to be used for construction purposes. The locations of existing underground utilities are shown in their approximate locations as per available company records. The exact location of all underground utilities should be verified by "Miss Utility" (1-800-257-7777) prior to any excavation. Greenhorne & O'Mara, Inc. does not express or imply a guarantee or warranty as to the location or existence of any underground utility.

TRACT AREA TABULATION

	Parcel 6	+ Part of Parcel 9	= Total SE Area
Gross Tract Area (GTA) =	18,750 s.f.	+ 3,795 s.f.	= 22,545 s.f.
-Area Previously Dedicated to Public Use* =	0 s.f.	N/A	
Residue =	18,750 s.f.	N/A	
-Area to be Dedicated to Public Use =	0 s.f.	N/A	
Net Lot Area (NLA) =	18,750 s.f.	N/A	

* Actual previous dedications have not been determined. Low intensity of proposed development makes the determination unnecessary.

DEVELOPMENT STANDARDS

	Required/Permitted	Provided
1. Building Height (59-C-4.351):	3 stories/42 Ft. Max.	1 story/ 19'-3" Ft.
2. Floor Area (59-C-4.352):	1.5 FAR (28,125 s.f. GFA)	0.14 FAR of Lot, 0.11 FAR of SE Area (2,552 s.f. GFA)
3. Setbacks to Property Line (59-C-4.353):		
- (a) Front:	10 Ft. Min.	43 Ft. +/-
- (b)(2) Side & Rear	0 Ft. Min.	15 Ft. Min.
4. Green Area (59-C-4.354) of Lot:	10% Min. (2,257 s.f.)	20.0% of Lot, 23.9% of SE Area (3,750 s.f.), (5,417 s.f.)
5. Parking Setbacks to Property Line		
- Adjacent to R/W (59-E-2.71):	10 Ft. Min.	4 Ft.*
- Adjoining other properties (59-E-2.72):	4 Ft. Min.	0 Ft.**

* Waiver requested. Proposed parking facility 1) Adjoins CBD, 2) Increases setback compared to existing conditions and 3) Provides 3' high masonry wall in lieu of landscape strip.

** Waiver requested. Rear lot line is interior to regional shopping center and both properties are under common ownership.

PARKING TABULATION (59-E-3.7)

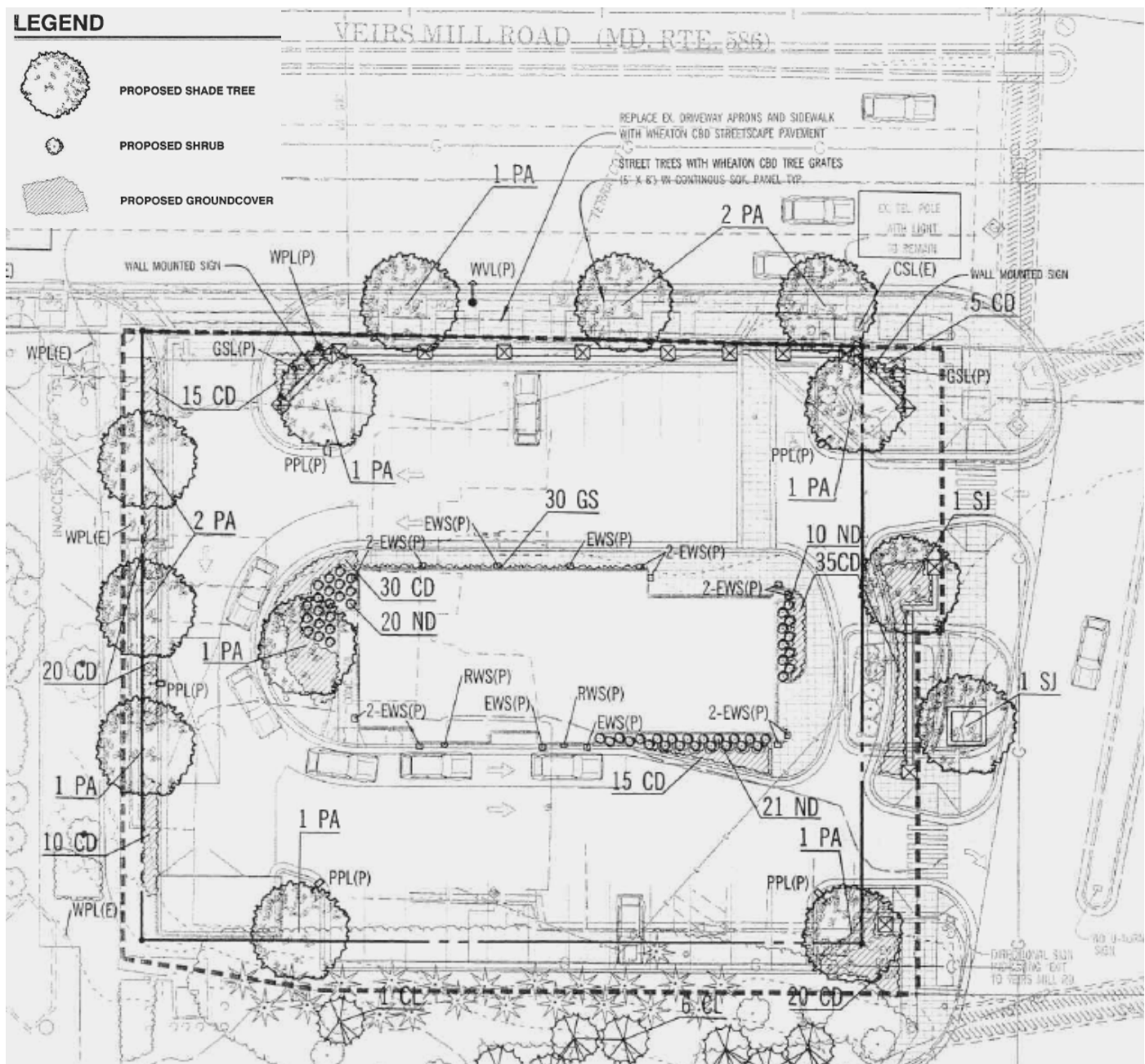
Parking spaces Required (59-E-3.7):

25 spaces per 1000 s.f. of floor area devoted to patron use (within establishment) @ 917 s.f. =	23 spaces
15 spaces per 1000 s.f. of ground area devoted to patron use (outside establishment) @ 0 s.f. =	0 spaces
Total Parking Spaces Required =	23 spaces
Parking Spaces Provided =	23 spaces including 1 accessible space








Petitioner's land planner, John Sekerak, described the vehicular access for the new Wendy's.

There will be three driveway access points – one “right-in, right-out” access on the northern edge of

the property along Veirs Mill Road, and two 14-foot wide driveways, one right-in and one right-out, along the mall's entrance road on the south side of the site. The drive-through cashier and pickup windows are located on the west side of the Wendy's restaurant, on the opposite side from Veirs Mill Road. Delivery trucks will use the Veirs Mill Road entrance, but will only visit during non-patron hours. Set forth below is the diagram from the final Landscape and Lighting Plan (Exhibit 64(b)), followed by its Lighting Legend, Plant Schedule and General Notes:



LIGHTING LEGEND

SYMBOL	KEY	DESCRIPTION
	WVL(E) WVL(P)	WHEATON STREETSCAPE VEHICULAR LIGHT (EXISTING) WHEATON STREETSCAPE VEHICULAR LIGHT (PROPOSED)
	WPL(E) WPL(P)	WHEATON STREETSCAPE PEDESTRIAN LIGHT (EXISTING) WHEATON STREETSCAPE PEDESTRIAN LIGHT (PROPOSED)
	PPL(P)	PARKING LOT POST LIGHT (PROPOSED)
	CSL(E)	COBRAHEAD STREET LIGHT (EXISTING)
	GSL(P)	GROUND SPOT LIGHT (PROPOSED)
	EWS(P)	EXTERIOR WALL SCONCE (PROPOSED)
	RWS(P)	RADIUS WALL SCONCE (PROPOSED)

- SEE SHEET 2 OF 2 FOR DETAILS

- LIGHTING HOURS OF OPERATION:

All lights to be connected to photo sensors and turn on at dusk.

- Building mounted lights to turn off time of closing.
- Parking lot lights to turn off an hour after time of closing.
- Sign lights to turn off time of closing.

PLANT SCHEDULE

Symbol	Quant.	Scientific Name	Common Name	Size (at time of installation)	Condition/Remarks
PA	11	Platanus x acerifolia 'Bloodgood'	'Bloodgood' London Planetree	2.5-3" cal.	B & B
SJ	02	Sophora japonica 'Regent'	'Regent' Japanese Pagodatree	2-2.5" cal.	B & B
CL	11	X Cupressocyparis leylandii	Leyland Cypress	4'-5' ht.	B & B
ND	51	Nandina domestica 'Atropurpurea Nana'	'Nana Purpurea' Heavenly Bamboo	15-18" sp.	Container
CD	150	Cotoneaster dammeri 'Coral Beauty'	'Coral Beauty' Cotoneaster	15-18" sp.	Container
GS	30	Gelsemium sempervirens	Carolina yellow jasmine	12" o.c.	Container vine

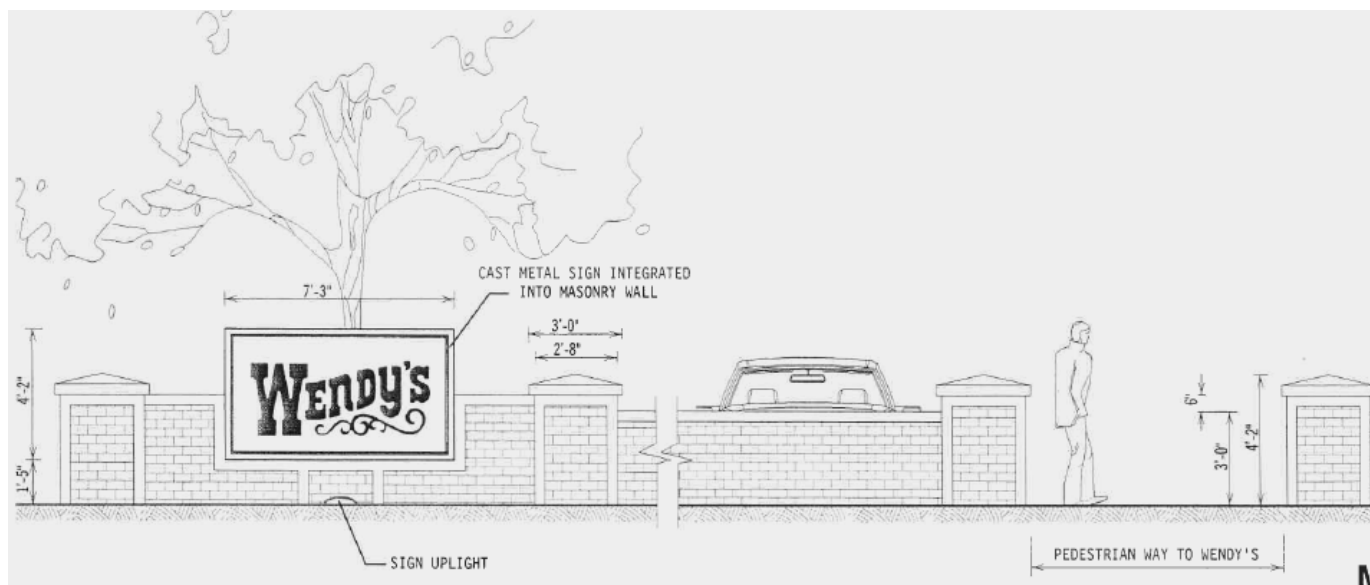
Any plant that dies during the duration of the special exception use will be replaced in kind.

GENERAL NOTES








1. Lot area: 18,750 S.F (0.43 acres). Tax map - HQ 61, Parcel N621
2. Existing zoning: C-2.
3. Boundary & topographic information for site is from a field survey by Greenhorne & O'Mara 04-25-05. Surrounding topographic information is from M-NCP&PC and utility information is from respective companies. Recent improvements to Viers Mill Road entrance to Wheaton Plaza are approximated from field observation.
4. There is no existing forest on site.
5. Water and Sewer categories: W-1 & S-1.
6. The site is within the Sligo Creek watershed (Class I).
7. The site is within the Wheaton CBD & Vicinity Master Plan Area (Planning Area 31).
8. The site is within the Wheaton CBD Policy Area.
9. Soils information is from the 'U.S.D.A., Natural Resource Conservation Service, Soil Survey of Montgomery County, Maryland,' 1995, Plate 24.

400 - Urban Land.
10. There are no streams on site.
11. There are no known rare, threatened, or endangered species on site at this time. An environmental review request was submitted to DNR on June 6th, 2005.
12. There are no known historic or cultural features on site.
13. There were no rock outcroppings or scenic views of note observed on the site.
14. There are no historic buildings or structures on the site
15. This plan is for planting purposes only. The locations of existing underground utilities are shown in their approximate locations as per available company records. The exact location of all underground utilities should be verified by "Miss Utility" (1-800-257-7777) prior to any excavation. Greenhorne & O'Mara, Inc. does not express or imply a guarantee or warranty as to the location or existence of any underground utility.

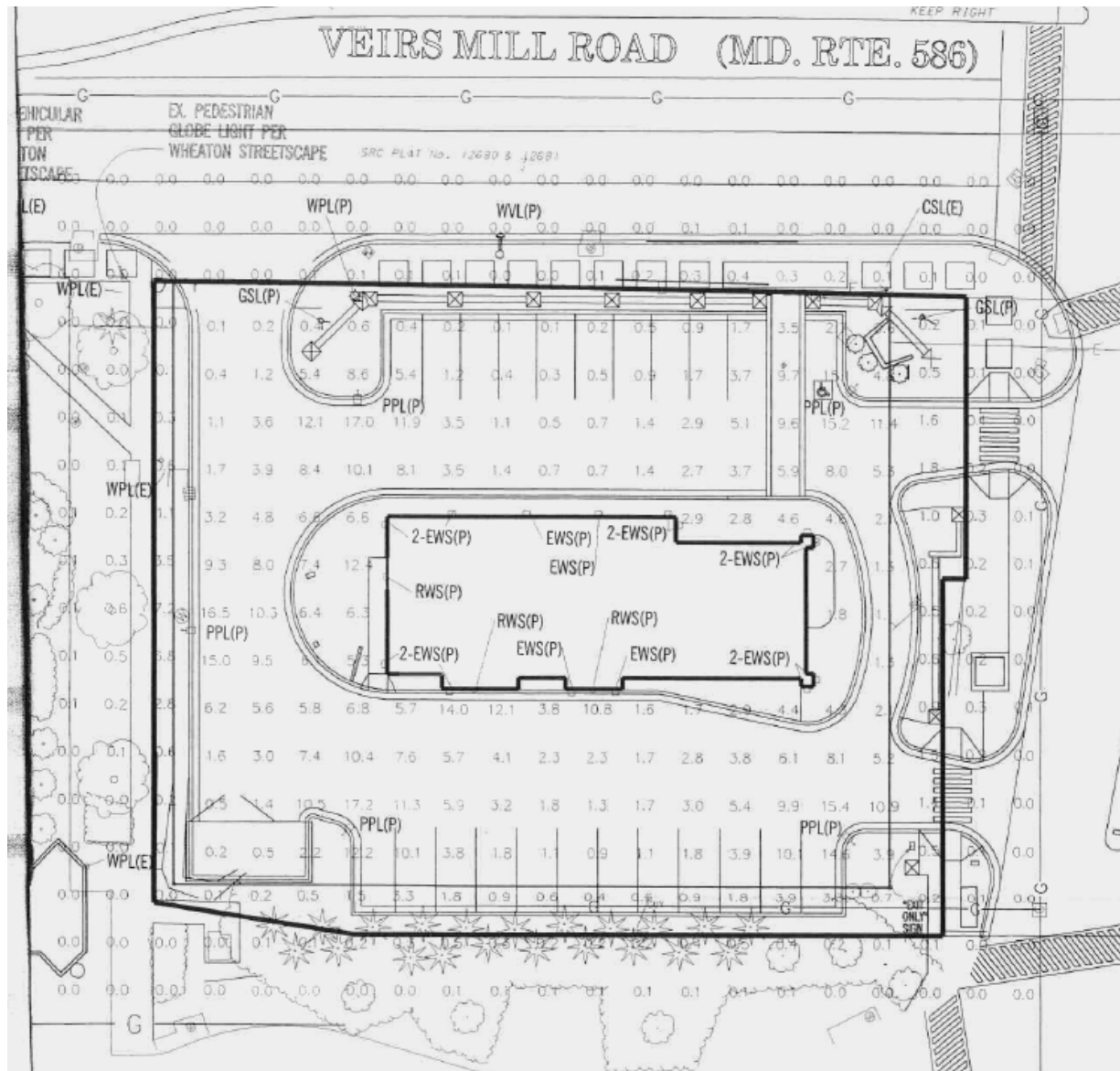
With the changes reflected in the revised site and landscaping plans, Technical Staff indicated that it “now finds the subject streetscaping satisfactory” (Exhibit 62, p. 4.) Also featured on the Landscape and Lighting Plan is a depiction of the masonry wall planned along Veirs Mill Road, with Wendy’s signs embedded at each end. The pylon sign, which had been proposed earlier, has been eliminated based on Technical Staff’s recommendation, and Staff is now satisfied with the proposed signage on the site (Exhibit 62, p. 2) :



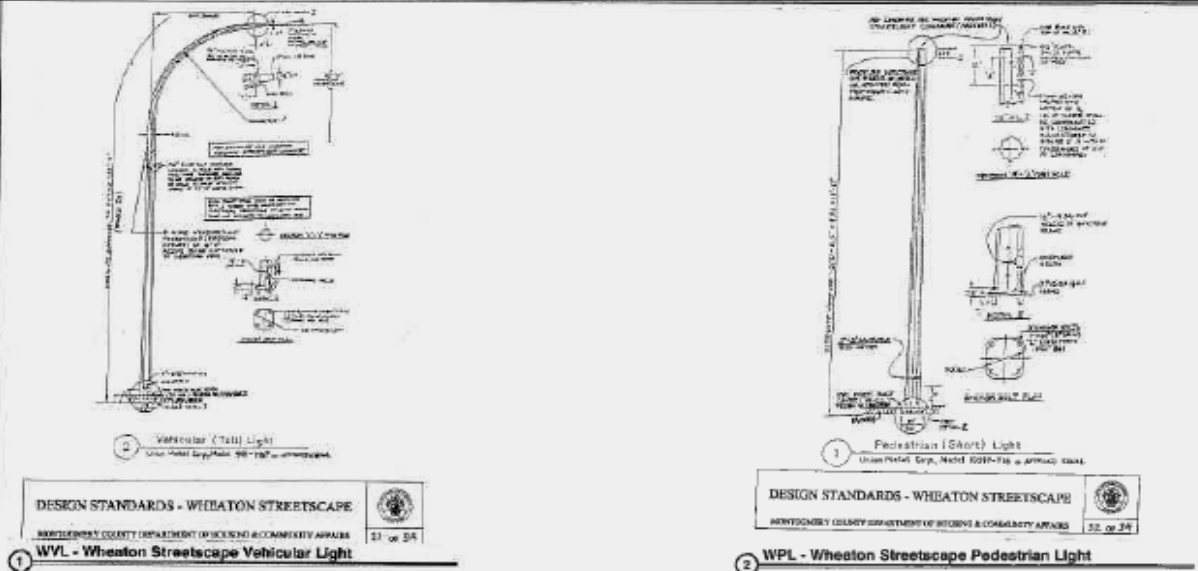
To satisfy other concerns raised by Technical Staff, Petitioner supplied details of its proposed lighting fixtures (Exhibit 64(c)) and revised its Photometric analysis and description of the proposed lighting, as shown in Exhibits 66(a) and 64(c), below and on the following pages:

ELECTRICAL SCHEDULE									
SYMBOL	LIGHTING PLAN KEY	DESCRIPTION	QUANTITY	TECH TOP FILTERS	QUANTITY	REQUIRED MOUNT	LUMENS	POLE TYPE	QUANTITY
	WVL (E)	WHEATON STREETSCAPE VEHICULAR LIGHT (EXISTING) P0-01287-P0-236623-150W-HP	1			30"		901-Y87	
	WVL (P)	WHEATON STREETSCAPE VEHICULAR LIGHT (PROPOSED) P0-01287-P0-236623-150W-HP				30"		901-Y88	
	WPL (E)	WHEATON STREETSCAPE PEDESTRIAN (EXISTING) LIGHT - ALB-18GCR3-100W-HP5	1			11"		10067-Y16	
	WPL (P)	WHEATON STREETSCAPE PEDESTRIAN (PROPOSED) LIGHT - ALB-18GCR3-100W-HP5				11"		10067-Y16	
	PPL (P)	PARKING LOT POST LIGHT (PROPOSED) RCB/RCS 400MH-IV-**-MT-HSS	5	TTF-10	5	30"	93,000	SSP-10-**-JT (4")	5
	CSL (E)	COBRA HEAD STREET LIGHT (EXISTING) MVRY-AL-R-400-MT							
	GSL (P)	GROUND SPOT LIGHT (PROPOSED)	2			8"			
	EWS (P)	EXTERIOR WALL SCONCE (PROPOSED) WS2000-50MH-**-120 (PROPOSED)	14			8"	3,200		
	RWS (P)	RADIUS WALL SCONCE (PROPOSED) RWS-70MH-**-120	3			8"	3,200		

NOTE: TOTAL WATTAGE PER GROUND FIXTURE DOES NOT EXCEED 100 WATTS. (E) Indicates EXISTING LIGHT FIXTURE & (P) Indicates PROPOSED LIGHT FIXTURE



LIGHTING IN THE PUBLIC RIGHT OF WAY (EXISTING AND PROPOSED)

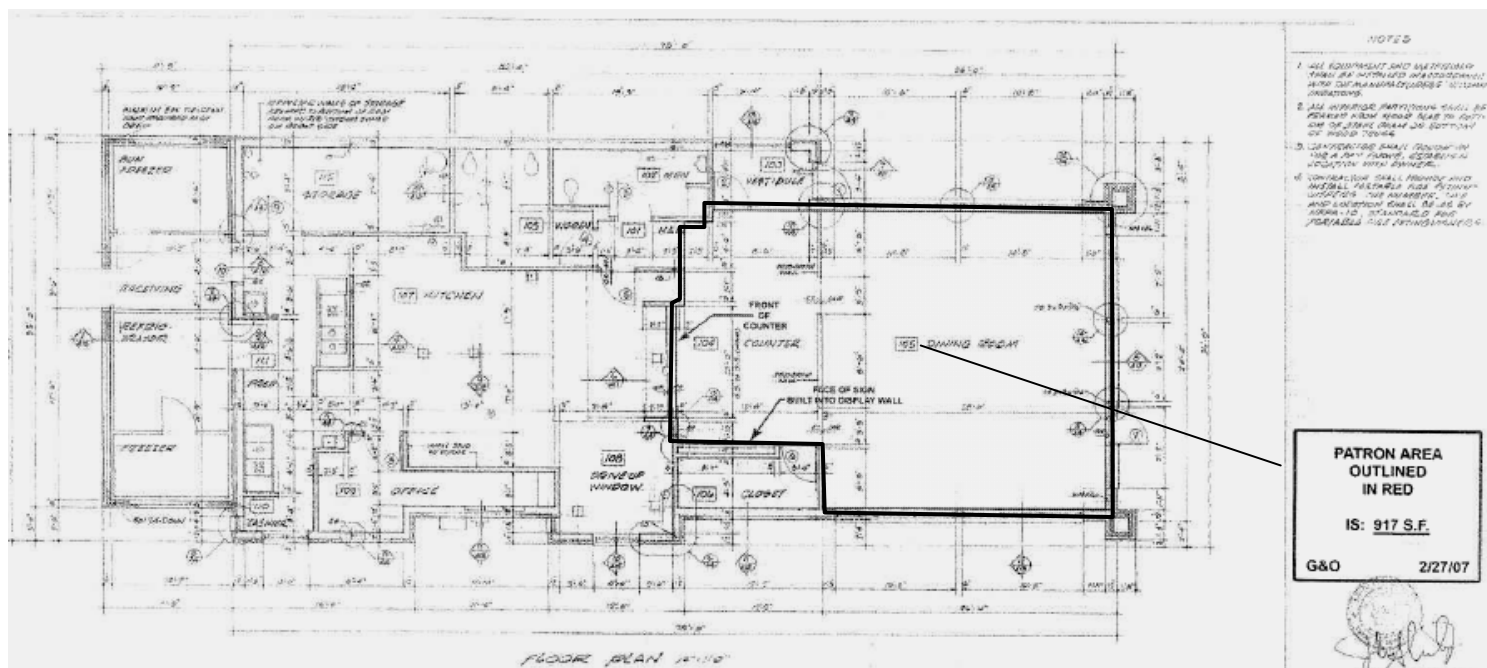


One observation about the lighting in Technical Staff's final report (Exhibit 62) should be mentioned. On page 3, Staff states, "As always, footcandles along the property line should not exceed 0.1." While it is true that the 0.1 footcandle standard is prescribed for side and rear property lines adjacent to residential properties (Zoning Ordinance §59-G-1.23(h)), the subject site is in the C-2 Zone, and is not adjacent to any residential properties. The Hearing Examiner therefore asked Technical Staff what the basis was for the quoted statement. The response was in the form of an e-mail (Exhibit 63), in which Technical Staff did not cite to any statutory provision, and instead reported that many different standards have been used by Technical Staff, ranging from "no trespass onto adjacent properties" to "1 footcandle" (*i.e.*, 10 times the 0.1 residential standard).

The common sense fact is that, in a commercial setting such as this one, more light is better for pedestrian safety and for the sense of security it provides. Moreover, the highest property-line footcandle readings in this case are found at adjacent lots owned by the same entity that owns the subject site, Westfield, and it clearly supports the petition. This is a commercial use surrounded by commercial uses. The closest residences to the site are multi-family uses, at the northeast corner of the intersection of Georgia Avenue and Pritchard Road, and they are about 400 feet away, on the other side of Veirs Mill Road and Georgia Avenue. The nearest single-family, detached home is on the other side of Amherst Avenue, about 900 feet away. Petitioner's land planner, John Sekerak, testified that the use would not cause any glare or other disturbing factors into any residential zone because of the distance and the nature of the activities surrounding it. Tr. 73-75.

Based on Technical Staff's response and the other factors cited above, the Hearing Examiner finds that there appears to be no objective statutory or regulatory standard for lighting in a commercial zone, and the lighting proposed by Petitioner is appropriate to the site and will not adversely affect its surroundings.

The final plan worthy of note is the revised floor plan (Exhibit 67(a)), showing the location and size of the “patron area,” which is 917 square feet in this case. That plan is shown below:



The size of the patron area (917 square feet) is significant because it is used by Technical Staff to calculate the required parking. Zoning Ordinance §59-E-3.7 provides that a restaurant must provide 25 parking spaces for each 1,000 square feet of indoor floor space devoted to patron use. In this case, the 917 square foot indoor patron area yields a requirement of 23 parking spaces, which is the number being provided by Petitioner. Technical Staff therefore concluded (Exhibit 62, p. 6), as does the Hearing Examiner, that the amount of parking to be provided will be adequate.

C. Waivers of Parking Regulations

As discussed above, Petitioner will be providing the required number of parking spaces; however, there are two parking regulations that it seeks to have waived pursuant to the authority granted the Board of Appeals in Zoning Ordinance §59-E-4.5. The first relates to Zoning Ordinance §59-E-2.71, which requires a ten-foot wide landscape strip between a parking facility and an adjacent

street right-of-way, and the second pertains to §59-E-2.72, which requires a four-foot wide landscape strip between a parking facility and the property line of an adjoining property other than a street right-of-way. These provisions also specify the number of shade trees that are required on the landscape strips, and §59-E-2.71 requires a three-foot hedge or wall for the strips adjacent to a public street.

The Planning Board unanimously recommended approval of the two parking waiver requests (Exhibit 31); however, Technical Staff opposed the waivers because of the large amount of impervious surface in the area, and their view that “the use seemed too tight for the site.” Exhibit 62, p.5. Staff also felt initially that Petitioner was not providing enough shade for the proposed parking lot. Exhibit 21, p. 12. Some of these concerns have been alleviated by Petitioner’s agreement to add more trees and to modify its landscaping, and Technical Staff therefore stated in its final report (Exhibit 62, p. 5): “If the Board of Appeals wishes to approve the waivers of the landscape strip and shade tree requirement, it is imperative that the applicant at least provides the streetscaping that it has now offered.” The Hearing Examiner has recommended a condition to this effect.

John Sekerak testified (Tr. 75-80) that the Petitioner is proposing “a superior alternative” to the requirements of §59-E-2.71, a four foot strip, with a masonry wall, which is a more urban treatment than a 10 foot wide landscape strip with a hedge. According to Mr. Sekerak, this waiver is common in the CBD, and he noted that the Zoning Ordinance expressly permits DPS or the Planning Board to reduce the width of the subject landscaping strip for properties located in a central business district “to achieve a better design solution through the provision of walls or fences in conjunction with landscaping.” §§59-E-2.71 and E-2.72. Although this property is just outside the CBD, the same rationale in favor of the waiver (*i.e.*, it allows a more urban treatment) would apply.

The proposed masonry wall would run along the entire frontage of Veirs Mill Road from the south side of the vehicular entrance, broken only by enlarged piers at the pedestrian entrance. The masonry wall also wraps around the south side, adjacent to the mall entrance road. According to Mr.

Sekerak, the four-foot strip will pull the building closer to the street, and the three foot high masonry wall replaces what otherwise would be a three foot hedge. It has the added benefit of clearly demarcating pedestrian routes. The elements used in the wall will be compatible with other treatments in the mall, the overpass and the architecture of the WMATA parking garage.

As to the second parking waiver request, Mr. Sekerak noted that all property lines are “paper property lines,” since all the land is under common ownership, and the parking facilities do not have to be set back from property lines under common ownership. Petitioner requests that there be no setback, and the owner (Westfield) agrees. According to Mr. Sekerak, when there is common ownership of adjoining lots in commercial zones, eliminating this setback is “a fairly common practice even without a waiver.” The landscape slope along the west side of the property is effective in accomplishing the purposes of the required four-foot setback, and Petitioner will be buffering this parking lot from the larger parking compound for the regional mall with an interruption of some evergreen plantings in that area. The existing single row of evergreen trees is an effective buffer, and Petitioner will further supplement that. In Mr. Sekerak’s opinion, the parking waivers will achieve the goals for which those setbacks were originally required in the parking ordinance, and through the use of the landscape area to the west of the site and the masonry wall along the frontage, he believes it will be a superior treatment to that which would otherwise be required in the Zoning Ordinance. Tr. 75-80.

The Hearing Examiner is persuaded by these arguments, and the fact that the Planning Board voted unanimously to grant the parking waivers. Considering the intended masonry wall on the Veirs Mill Road frontage, the landscaping agreed to by Petitioner, the proposed lighting and the other features discussed in this report, the Hearing Examiner finds that granting of the requested parking waivers would accomplish the objectives set forth in Zoning Ordinance §59-E-4.2, including protection of the health, safety and welfare of those who use the adjoining land and the abutting public road, as well as the pedestrians and motorists within the parking facility.

D. Public Facilities

Mr. Sekerak testified that the property is served by adequate public facilities, including public water and sewer, and storm water management. Tr. 101. Given the nature of the special exception, it will have no impact on school capacity.

Petitioner's transportation planner, Glenn Cook, testified (Tr. 128-147) that he performed a traffic study under the supervision of Park and Planning staff, which provided an outline of the study area and gave him information about other developments that have been approved in the area. He collected existing traffic data, which included pedestrian counts, and made projections for traffic to be generated. He then combined them with projections of traffic that a fast food restaurant of this size would generate, assigned that traffic to the road system and analyzed the entire road network. In this area of the County, the congestion standard is a critical lane volume (CLV) of 1800. He found that all of the study area intersections would be operating below that 1800 threshold. Mr. Cook's report is in the record as Exhibit 10.

Mr. Cook noted that, according to national standards, approximately 50 percent of the traffic to a fast food restaurant will come from the existing traffic along the roadways. Many people on the road network heading to another destination choose to stop and grab something to eat, before continuing on their way. These "pass-by" vehicles do not represent a new trip being attracted to the site. Where, as here, the restaurant is located right at the mall and near to the Metro station, he opined that the pass-by percentage would even be a little bit higher, but he used the national averages for the purposes of the study, and assumed that 50 percent of the traffic would be "pass-by traffic." He feels that his projection is therefore a conservative one.

Mr. Cook's report indicates that new trips generated by the proposed restaurant would be 69 (136 – 50%) in the morning peak hour and 44 (88 – 50%) in the evening peak hour. Exhibit 10, p. 14. Three intersections were studied – Veirs Mill Road (MD 586) at Reddie Drive, at the Mall

Access Road and at Georgia Avenue (MD 97). The highest projected CLV was 1230 at Veirs Mill Road and Reddie Drive in the evening peak hour, well below the 1800 standard. Exhibit 10, p. 18.

In a memorandum attached to Technical Staff's Supplemental report of November 20, 2006 (Exhibit 28), Transportation Planning Division agreed that the revised application met Local Area Transportation Review (LATR) standards, but recommended that the Department of Public Works (DPWT) and the State Highway Administration (SHA) coordinate further regarding potential means to address the inadequate storage capacity (*i.e.*, the stacking issue) in the northbound lanes of Veirs Mill Road and the Metro Bus Access intersection (*i.e.*, near the Bally's entrance to the mall). Mr. Cook addressed this problem in his testimony (Tr. 138-141), and he observed that traffic occasionally backs up, not so much because of volume, but because occasionally people coming southbound on Georgia Avenue make a sort of U turn onto Veirs Mill Road going northbound, and then try to squeeze into the turn lane to make a left. He indicated that was not a problem generated by Petitioner, and should not be made worse by its plans.

Transportation Staff did not recommend disapproval of the petition based on this issue, and given the clear compliance with LATR standards, the Hearing Examiner finds that the road system is adequate to accommodate the additional vehicular traffic that will be generated. Concerns raised by Technical Staff about possible vehicular/pedestrian conflicts will be discussed in Part II.F. of this report, below.

E. Environment

For storm water management, Petitioner will provide an underground water quality facility, which will discharge directly to the public storm drain system that is part of Veirs Mill Road. Tr. 80. Quantity controls and recharge are not necessary because this is a redevelopment of an already impervious area. The storm water management concept plan has been approved by the Department of Permitting Services (DPS), in a letter dated August 18, 2005, a copy of which is attached to Exhibit

21. The property is exempt from forest conservation requirements under Chapter 22a, as evidenced by Environmental Planning Staff's exemption letter of September 13, 2005 (Exhibit 7(b)). That letter also notes that the property is not within a Special Protection Area.

Environmental Planning Staff recommended that, prior to release of the building permits, Petitioner be required to provide evidence of compliance with all federal and state Clean Water Act requirements for underground storage tank abandonment and/or removal. Petitioner provided a letter dated October 26, 2005, from the Maryland Department of the Environment indicating that the underground gasoline tanks had been successfully removed from the site, and that all the remediation that needed to be done for the gas station has been accomplished. *See* Exhibit 46.

Given this evidence, the Hearing Examiner finds that there are no environmental issues warranting denial of this petition.

F. Technical Staff's Objections

Technical Staff based their recommendation of denial upon their analysis of six factors, as set forth on page 1 of their November 20, 2006 supplementary report (Exhibit 28):

1. Master Plan consistency;
2. Compatibility with the surrounding area;
3. Non-inherent characteristics;
4. Possibility of pedestrian/vehicular conflicts;
5. Unresolved landscaping, lighting, and signage issues; and
6. Need for a floor plan to substantiate patronage area and hence parking requirements.

These six factors are discussed in order below:

1. Master Plan Consistency; and
2. Compatibility with the Surrounding Area

The property is located within the area covered by the *Comprehensive Amendment to the Sector Plan for the Wheaton Central Business District and Vicinity*, approved and adopted September 1990. A memo dated June 27, 2006 from M-NCPPC's Community-Based Planning (CBP) staff concludes that "the proposal is not consistent with the goals and objectives of the Wheaton Sector

Plan.” CBP staff notes that the “intent of the Plan – to revitalize the entire Wheaton commercial core and create an attractive, pedestrian-oriented environment throughout the Wheaton CBD and Wheaton Plaza – does not support a suburban style drive-through fast food restaurant at this location.” In the opinion of CBP staff, the proposal does not comport with the Sector Plan’s urban design guidelines. Exhibit 21, p.10.

In its supplemental report of November 20, 2006 (Exhibit 28, p.4) Technical Staff summarized its opposition to the proposal:

. . . [T]his site is an inappropriate location for the proposed use. Locating a drive-in with a drive-through lane on a site that is within the Wheaton CBD Policy Area, directly across the street from a transit station, right next to a mall, and immediately outside of a central business district does not conform with the master plan’s vision for the area, is not in keeping with smart growth and new urbanist principles, and contravenes the zoning ordinance’s stated locational policy for drive-in special exceptions, namely that they should not be located in places where they will cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity. [Emphasis in original.]

The issue raised in the last part to the quote, regarding pedestrian/vehicular conflicts, will be discussed in the next section of this report, while this section addresses Master Plan compliance and compatibility with the area. First, a few words about compatibility.

The nearest residences to the site are multi-family residences, at the northeast corner of the intersection of Georgia Avenue and Pritchard Road, and they are about 400 feet away, on the other side of Veirs Mill Road and Georgia Avenue. The nearest single-family, detached home is on the other side of Amherst Avenue, about 900 feet away. This site is on the periphery of a very large regional mall, and is adjacent to Veirs Mill Road, a major roadway. It is also very near a large intersection with Georgia Avenue. The Metro bus station area is directly across the street. A four-story parking garage is directly to the north of the property. Nearby there are surface parking lots, a Bally's Fitness Club and other retail uses. The area is obviously very commercialized, and thus compatible with a commercial use such as the proposed restaurant. As is evident, the proposed use

would not cause any glare or other disturbing factors into any residential zone because of the distance and the nature of the activities surrounding it. Tr. 73-75. For Technical Staff, the compatibility issue is not whether the proposed use would be incompatible with residential areas, but whether it is too suburban for the urban look recommended for the area by the Master Plan. Technical Staff points out that restaurants with a “drive-through” are not permitted at all in central business districts. On the other hand, the subject site is not in the central business district.

The Sector Plan does not specifically discuss the subject property, but it does specify that those uses west of Veirs Mill Road in this area should remain commercial. See “Land Use Plan” on page 28 of the *Comprehensive Amendment*. The Sector Plan (at page 47) recommends this area for the C-2 Zone. In the C-2 Zone, a drive-in restaurant (*i.e.*, including a restaurant with a drive-through) is a use which requires a special exception; however, a restaurant other than a drive-in is a permitted use, and no special exception would be required. Zoning Ordinance §59-C-4.2(d). It is therefore difficult for the Hearing Examiner to understand the depth of Technical Staff’s opposition regarding the urban design issue. A fast-food restaurant without a drive-in, looking essentially the same from the street as the planned restaurant⁹ (or even one without the urban streetscape promised by Petitioner in this case) could have been constructed by right at this location. How can one say, then, that the Master Plan does not contemplate this type of establishment in this area, from an urban design perspective?

Mr. Sekerak noted that the Sector Plan also recognizes the vehicular orientation of the regional mall context, stating on page 21 of the Plan that driving to and within Wheaton is pleasant, and parking is available for those needing to travel by car. In that connection, he observed that the proposed restaurant would provide both on-site parking and a drive-through for the patrons coming to

⁹ The drive-through pick-up and payment windows are on the west side of the restaurant, and are therefore hidden from Veirs Mill Road.

the site. In Mr. Sekerak's opinion, Petitioner has come up with a very efficient layout that brings the restaurant into a direct relationship with the street, a design goal sought by Technical Staff. Mr. Sekerak noted that providing a street orientation for the restaurant to Veirs Mill Road was a "real enhancement," and he does not believe the site design can be improved by a remand to Park and Planning. He added that the proposed masonry wall screens the fronts of the cars, and the materials and colors will coordinate with Wendy's masonry architecture and with materials and colors found in the WMATA garage and with some of Westfield's architectural elements. Perhaps even more important, Petitioner's plans will comply with the "Wheaton streetscape"¹⁰ standards along the street frontages, even though the subject site is technically outside of the CBD.

The urban design people from Park and Planning have already been involved, and according to Mr. Sekerak, "There are no design solutions that bring the building to the street frontage and yet still provide safe access, parking and a drive-through." Tr. 97-98. In his opinion, the subject use and the site plan are consistent with the Sector Plan, contrary to Technical Staff's opinion. Tr. 89-91. Mr. Sekerak believes Technical Staff's approach would effectively eliminate drive-through restaurants in all urban areas, and therefore in C-2 zones, even though the Zone permits them by special exception.

It is obviously difficult to determine where the subject proposal fits into "the vision" of the Master Plan. It appears to the Hearing Examiner that the Master Plan vision in this case, like beauty, is largely "in the eye of the beholder." Although Technical Staff feels that the subject proposal is inconsistent with the Master Plan, it is the Planning Board that is charged with the primary responsibility for insuring consistency with the Master Plans it has adopted, and the Planning Board unanimously recommended approval of this petition (Exhibit 31). Moreover, as discussed in Part II. G. of this report, the Wheaton Redevelopment Advisory Committee, a body appointed to advise the

¹⁰ According to Technical Staff, the Wheaton Streetscape requirements are found in the *Wheaton Central Business District Road Code Design Standards*, issued by the Montgomery County Department of Housing and Community Development and Department of Transportation, April 1990. Exhibit 21, p. 5.

County Executive and others on all phases of the revitalization of downtown Wheaton, characterized the proposed use as “well designed” and recommended approval of the petition. Exhibit 27.

Considering these facts, and the above discussion, the Hearing Examiner concludes, as did the Planning Board and Petitioner’s land use expert, that the proposed use comports with the Master Plan and is compatible with the surrounding area.

3. Non-Inherent Characteristics; and
4. Possibility of Pedestrian/Vehicular Conflicts.

The non-inherent characteristics referenced by Technical Staff consist of “a location within a redeveloping, highly urbanized pedestrian environment near a Metro Station that would cause adverse effects.” *See* initial Technical Staff report, Exhibit 21, p. 15. The adverse effects, which Technical Staff considered sufficient to warrant denial, involve the concern about potential pedestrian/vehicular conflicts, a concern which is addressed in this section.¹¹

It is indisputable that pedestrians will be at some risk whenever they cross any street or driveway, yet such crossings are a necessary part of daily life. So the question we must address is whether the site conditions here create a risk to pedestrians so out of the ordinary that the use may not be permitted even though all possible steps have been taken to protect pedestrians, within the constraints of the site. Although Technical Staff initially so concluded, Transportation Planning Staff ultimately recommended approval, characterizing it as a “close call.” *See* Exhibit 28, p. 5, and attached Memorandum of November 15, 2006 from Transportation Planning Staff.

In the purpose clause of the C-2 zone, it specifies that C-2 Zones are often found in central urban commercial areas. Petitioner’s land planner, John Sekerak, notes that these areas inherently have a relatively high degree of pedestrian activity, as distinguished from a more suburban context.

¹¹ Technical Staff’s concern was echoed in a July 7, 2006, letter to Technical Staff from Matthew Greene, the County Executive’s Pedestrian Safety Coordinator (Exhibit 23(a)). Since that letter raises the same points discussed by Technical Staff, and pre-dates Transportation Planning Staff’s revised November 15, 2006 review, it will not be separately addressed herein.

Mr. Sekerak feels that this site has a relatively low level of pedestrian activity since “pedestrians along here aren't doing comparison shopping strolling around the street.” Tr. 90. They are accessing the regional mall, and as demonstrated in the “pedestrian alternatives” exhibit (Exhibit 34, shown below), they have any number of far superior routes in terms of safety and convenience to cross Veirs Mill Road away from the proposed site.



Mr. Sekerak also correctly observed that the subject site is not part of (or even next to) the primary “Pedestrian Way” through the Wheaton CBD area, as shown on page 39 of the Sector Plan. He noted that the WMATA garage, which obviously is oriented toward vehicular use, is on the same side of Veirs Mill as the subject site, while the pedestrian way is shown to the east of Veirs Mill in the

Sector Plan. He opined that the subject site will be “the most pedestrian friendly drive through restaurant in Montgomery County.” In his opinion, “this is a fabulous location for a drive through restaurant. Vehicular access is convenient and safe and we've designed a site that provides that interplay with pedestrians so there are minimization of conflicts.” Tr. 92-93.

Mr. Sekerak praised the addition of the fence along Veirs Mill road and the pedestrian bridges because they rerouted a great deal of pedestrian traffic, and by his observation, reduced the pedestrian traffic across the intended Wendy's driveways. The narrowed (14 foot wide) driveways also increase pedestrian safety. At the front door entrance area there is a raised crosswalk, directly connecting to Veirs Mill Road. That raised crosswalk, by its paving patterns, visually identifies it as a pedestrian way. Also, its raised elements have a traffic calming effect, tending to slow cars down as they enter the site. Tr. 54-57. There is also a three-foot high masonry wall along the Veirs Mill Road frontage which helps steer pedestrians into the entrance on the Veirs Mill side.

Petitioner's transportation planning expert, Glenn Cook, did a pedestrian count and a vehicle turning movement count as part of his traffic study. These counts were done during the peak periods for vehicular traffic, and he found that 75 pedestrians would be in the Veirs Mill Road/Mall Access Road intersection during the morning peak hour, and 84 during the evening peak hour. Mr. Cook testified that, in a CBD or an area like it, you are going to have pedestrian/vehicular conflicts no matter what use you have on the site. He opined that, through meetings with the County and Park and Planning, this site has been made as pedestrian friendly as possible. In Mr. Cook's professional opinion, the transportation network in the surrounding area is adequate to accommodate the proposed use, and the system and circulation are safe, adequate and efficient for the proposed use. Tr. 131-137.

Transportation Planning Staff agreed that the improvements added by Petitioner had made the proposed facility “the most pedestrian friendly drive-in design as possible for the location.” They also noted that there are undesirable inherent effects for a drive-through at a location where

pedestrian activity is encouraged; however “drive-through restaurants are not inherently unsafe.”

Revised Transportation Planning Staff Memorandum (page 3), dated November 15, 2006, and attached to the November 20, 2006 Supplemental Technical Staff report (Exhibit 28).¹²

It is thus undisputed in the record that Petitioner has done everything that can be done to reduce the risks to pedestrians, short of giving up on its plan for a drive-through restaurant. The Hearing Examiner is most persuaded by the fact that a restaurant without a drive-through is permitted as a matter of right in the C-2 Zone, and the evidence is that there is nothing inherently more dangerous about a restaurant with a drive-through than one without, except that for any given size, it would generate more vehicular traffic and therefore more potential vehicle/pedestrian conflicts.¹³ Tr. 143. This fact must be considered in conjunction with the evidence that, absent a drive-through, the restaurant would have to be bigger to generate more volume and thus more revenue. Tr. 146-147.

Taken together, this evidence suggests that the net result would be the same or worse for pedestrians if a drive-through were not permitted, as demonstrated by Exhibit 45, a comparison drawn up by Petitioner’s transportation planner, Glenn Cook. Tr. 144-145. It shows that a restaurant of the planned size with a drive-through would actually generate fewer vehicle trips in the critical hours than a restaurant 1,000 square feet larger, without a drive-through. This is the approximate increase in size that Westfield’s representative, Anthony Alessi, suggested would be necessary if a drive-through were not permitted. Tr. 146-147.

¹² Transportation Planning Staff’s memorandum also discusses pedestrian crossing times at various intersections, and concludes that those times are insufficient at some of the intersections. Staff notes, however, that DPWT disagrees, and Staff indicates that it will continue to work with DPWT on this matter. Since neither the level of pedestrians at the studied intersections, nor the amount of time allowed by the DPWT for crossing, is likely to be greatly affected by the addition of a drive-in restaurant in the area, the Hearing Examiner concludes that these findings do not bear on the analysis necessary for this report.

¹³ It should be noted in this context that almost all of DavCo’s restaurants have drive-throughs (Tr. 25-26); yet, there has not been a claim against DavCo for the last 15 years arising out of a pedestrian/vehicular accident, as confirmed by DavCo’s risk manager, Stacey Jackson, in a letter dated July 14, 2006, (Exhibit 36). Tr. 42.

Considering the entire record in this case, the Hearing Examiner finds that the subject use can be operated with reasonable safety for pedestrians. While there is no way to reduce the risk to zero, all the expert evidence is that Petitioner's revised plans will reduce the safety risks as much as possible. Nevertheless, in order to make sure that actual operation of the use results in a reasonably safe condition for pedestrians on the site, the Hearing Examiner recommends a condition in Part V of this report, requiring annual reporting to the Board of Appeals of any vehicle/pedestrian accidents that occur on site. The proposed condition would read:

Petitioner shall submit an annual report to the Board of Appeals detailing any vehicle/pedestrian accidents on the site during the preceding year. The first such report shall be due one year after the use becomes operational. If no accidents have occurred, the report should still be filed, so indicating. These reports shall identify the date of any such on-site accident, the names of the involved parties, the nature of any injuries, the precise location of the accident, a brief description of the circumstances and a suggested remedy from Petitioner for any dangerous conditions that are revealed. Petitioner should attach a copy of related police accident reports to its filings. A copy of Petitioner's reports should also be filed with the Office of the People's Counsel and M-NCPPC's Transportation Planning Division, which shall submit remedial recommendations to the Board of Appeals within one month of receiving any report revealing one or more vehicle/pedestrian accidents. The Board shall retain jurisdiction over this matter to review these annual reports and determine what action, if any, is necessary to insure reasonable safety to pedestrians on the subject site.

The Hearing Examiner feels that such a condition would not impose an undue burden upon Petitioner, since most annual reports should reveal no accidents, if Petitioner's experts are correct. On the other hand, if it turns out that a dangerous condition is being created by the use, the reporting requirement will bring it to the attention of the Board and provide a vehicle for remedying the situation.

5. Unresolved Landscaping, Lighting, and Signage Issues; and
6. Need for a Floor Plan to Substantiate Patronage Area and Parking Requirements.

These last two factors were largely resolved by Petitioner's submission of revised site, landscaping, lighting, signage and floor plans after the hearing. *See* Exhibits 55 and 60. These revised plans were reviewed and substantially approved by Technical Staff, with a few additional suggestions. *See* Technical Staff's "Third and Final" report dated March 2, 2007 (Exhibit 62) and the March 7,

2007 e-mail to the Hearing Examiner from Technical Staff (Exhibit 63). Additional staff suggestions were then incorporated into further revisions in the plans filed by Petitioner on March 7 and March 16, 2007. *See* Exhibits 64, 64(a), (b) and (c), and Exhibits 66, 66(a) and 67(a). All revised plans incorporating substantive changes were publicly noticed. *See, e.g.* Exhibit 65.

The changes brought about by the post-hearing submissions and review include:

- a. An improved Site Plan by angling the masonry wall at the ends;
- b. Improved landscaping by adding and reorganizing trees to be planted;
- c. Modified lighting to reduce escaping glare (Plans were also modified to show more details and clarify the photometrics);
- d. Elimination of a planned pylon sign, and substitution of two “monument” signs incorporated into the angled portions of the masonry wall; and
- e. Submission of a revised Floor Plan showing the patronage area, thereby allowing Technical Staff to determine that adequate parking would be provided on site.

The Hearing Examiner concludes that these changes and clarifications have satisfied the concerns raised by Technical Staff in factors 5 and 6 set forth at the beginning of this section.

G. Community Response.

There were two letters of opposition from members of the community, but no opposition appeared at the hearing. The letters of opposition (Exhibits 16 and 17) centered on traffic and parking problems in the area. These issues were discussed earlier in this report, and while there are some legitimate concerns about traffic, the Hearing Examiner concludes that the proposed use meets all the standards applicable to traffic and parking at the site.

A letter of support was received (Exhibit 27) from the Wheaton Redevelopment Advisory Committee (WRAC).¹⁴ The Committee reviewed DavCo’s proposal and voted to support the approval of the petition. WRAC feels that, while it might prefer a higher density, mixed-use development in the area, that option is effectively precluded by the small size of the property, the C-2 Zone’s height limit of three stories and the need to provide on-site parking. WRAC added that the

¹⁴ WRAC consists of Wheaton area residents and business operators appointed by the County Executive to advise the County Executive, the Director of the Wheaton Redevelopment Program, and the Director of the Mid-County Services Center on all phases of the revitalization of downtown Wheaton.

Wendy's Restaurant represents a viable reuse of property which had been used for a gas station.

The Committee believes that the parking waivers requested by the applicant are of minor effect and will not result in less landscaping for the site. Moreover, WRAC concluded that the proposed development is well designed (including, as it does, the full "Wheaton streetscape" along the street frontages), that it will provide the required parking on site and that the access and circulation will not adversely affect pedestrians.

Martin Klauber, the People's Counsel was unable to attend the hearing, but he sent an e-mail to the Hearing Examiner (Exhibit 32) a few days before the December 4, 2006 hearing, recommending that the case be remanded back to M-NCPPC's Urban Design Section, in the Development Review Division for "another level of design review." The Hearing Examiner does not believe that a formal remand for additional design review is necessary or desirable at this point. The record was held open after the hearing to allow Petitioner time to further respond to concerns raised by Technical Staff about site design, landscaping, lighting, signage and parking. As a result, significant additional changes were made, resulting in a revised set of plans being filed, and Technical Staff's issuance of a "Third and Final" report on March 2, 2007 (Exhibit 62). The Hearing Examiner is satisfied that the final plans in this case sufficiently address the design concerns raised by the People's Counsel and other considerations raised by Technical Staff.

III. SUMMARY OF THE HEARING

Six witnesses testified at the hearing, Anthony Alessi, Development Director of the Westfield Wheaton Project; Harry Porter, DavCo Project Manager; John Sekerak, Land Planner; Thomas J. Flynn, Market Analyst; Robert Saunders, Architect; and Glenn Cook, Traffic Engineer.

1. Anthony Alessi (Tr. 14-22, 32, 72, 78, 86-88, 99-100, 106-107, 146-147 and 153-154):

Anthony Alessi testified that he is the development director of the Westfield Wheaton project. He noted that an extra 1.4 million people have been drawn to the shopping center since opening

Macy's, and Westfield's extensive worldwide retail experience indicates that they need to bring in better recognized national chains such as Wendy's, which they believe will be a regional draw that will enhance the shopping center.

Mr. Alessi testified that Park and Planning recognized the fact that the shopping mall is a regional center, and thus this destination inherently draws vehicles to the center. The Wendy's site is part of this regional mall, and Westfield is concerned about pedestrian customer safety. Mr. Alessi testified that he serves on the pedestrian committees downtown. In fact, when Westfield did the Wheaton Macy's expansion, it added hundreds of yards of concrete sidewalks because people were walking in the middle of the roads around the site, and the effort was to give them clear and defined pathways.

Mr. Alessi worked with the County to develop those pathways which eventually included a WMATA pedestrian bridge connection over the ring road around the mall, in addition to the one over Veirs Mill Road. That new bridge on the Westfield property opened last week [*i.e.*, in November 2006]. The intent is to get people off of the main roads, over the bridges, through the garage into the center right at the main food court entrance, and ultimately back from the center to Metro. This design was intended to alleviate all pedestrian traffic to and from the center of Metro in the future.

In addition, a fence along Veirs Mill Road has been put up by the County to keep people from crossing mid-block. Prior to the fence, there were many pedestrian movements straight across the road in an unsafe manner. The fence runs along the entire median from Reddie Drive all the way down to the south access road on Veirs Mill Road. This fence is about eight feet high, and it prevents people from crossing in the middle of the road. Now they must cross at Reddie Drive, use the pedestrian bridge, or proceed down to the south access. The shortest distance now for the customers is to use the pedestrian bridges.

The result of these improvements is to reduce the number of pedestrians crossing the driveways for the planned Wendy's. Tr. 20-21. According to Mr. Alessi, hoards of people are now coming through that garage and exiting through the garage. They're now finding out that the new pedestrian bridge is up there and they're starting to use that as designed. Mr. Alessi pointed out these features on Exhibits 33 and 34. There's a safe, striped pedestrian way through the garage connecting the bridges.

According to Mr. Alessi, the Metro Bus Depot is currently being developed with a high density office complex above the bus station. That eventually will help finish the whole pedestrian future pathway.

Mr. Alessi further testified that Westfield had considered putting an office building on the subject site, but because of its small size, its parking would have to be off site, creating additional safety and functional problems with visitors crossing the mall ring road to access the buildings. Plans for an office building on the site were therefore rejected.

Mr. Alessi indicated the site will be patrolled by Westfield security guards on a regular basis. Tr. 32.

According to Mr. Alessi, the comprehensive signage plan for the property is recognized by the County. Any deviation or changes to that still need to go through the County permitting process. If they stay within the footprint then it is by right; if they go outside the footprint, it is by hearing. Tr. 72. Mr. Alessi indicated that Westfield has no objection to waiving the parking requirement for a four-foot wide landscape strip between the parking facility and the property line. Tr. 78.

Mr. Alessi indicated that the Bozzutto air rights development over the bus depot has been approved at site plan review. It is commonly referred to as the WMATA Air Rights Project in Wheaton. The plans on file with the Park and Planning Commission encompass this whole triangle

right down to the green area, which will be maintained, but a four to five story building will encompass this entire triangle. Tr. 86-88.

According to Mr. Alessi, Westfield normally don't invest this much into streetscapes around its properties. It is probably spending about \$100,000 more than normal, and that is driven by having to get County approval for the special exception. So, if this were a non-drive through use, where there was no County participation in this process, it is likely that that operator would not provide the streetscape promised here. Tr. 99-100.

Mr. Alessi noted that parking on the subject site is tied to the overall parking in the mall, as a whole, and it's parking ratio calculation. Westfield required DavCo to maintain the same amount of parking spaces on site as the pre-existing gas station had. Tr. 106-107.

Mr. Alessi's projected that if a drive-through were not permitted on the site, the restaurant would have to be about 1,000 square feet larger to generate more volume. Tr. 146-147.

Mr. Alessi testified that by converting the subject site from a gas station to a Wendy's, Westfield thought it would be drawing more customers to downtown Wheaton, which was what the County was looking for. Westfield is revitalizing the center, which the County is still trying to do with the downtown area. Westfield could have done something on the site a little bit different, by right, without having to go through the exemption process and without having Park and Planning's opinion. However, market demand indicated that Wendy's is one of the highest and best uses for that property, not already represented in that market. Tr. 153-154.

2. Harry Porter (Tr. 13-14, 23-44)

Harry Porter testified that he is the project manager representing DavCo Restaurants. He certified that DavCo would comply with any terms and conditions if the special exception were granted.

DavCo Restaurants has been in business for approximately 30 years, and it is the second largest Wendy's franchisee in the United States. DavCo Restaurants is also the eighth largest restaurant franchisee in the United States, operating approximately 157 stores, with four stores under construction. DavCo operates in Maryland, Northern Virginia and Washington, D.C.

DavCo will only build restaurants with a drive-through. It's part of its prototype to have the drive-through and pickup window. DavCo feels that it serves a need for the community, and it is a large portion of sales, including a late night group of customers that couldn't be served without the drive-through restaurant. The restaurant itself closes at 10 o'clock, and the drive through window remains open to 2 o'clock in the morning, which serves that customer who's just returning home from work and would like a quick sandwich. DavCo spends a great deal of money advertising late night availability, competing with larger hamburger companies like McDonalds. So it's a big part of Wendy's, a drive-through restaurant being open late at night. The only exceptions would be a store within a shopping center, an office building or an airport.

DavCo selected this site because there is a need for a quick service restaurant in this area, based on the projected growth in population and businesses and workers in the area. DavCo is also excited about being a viable part of the community. DavCo would hire 50 people from the community. Mr. Porter characterized the area as "vibrant," a growing, expanding area.

Mr. Porter described Wendy's product line and indicated the hours they would like to be open: from 6:30 in the morning until 10 o'clock in the evening, with the drive-through window open until 2 o'clock in the morning. Initially, the restaurant would open at 10 a.m. Tr. 29-30. Petitioner will provide security, along with Westfield, to prevent crowds of teenagers from hanging out around the restaurant late at night. DavCo's lease requires it to maintain the site safe, as well as clean.

Mr. Porter testified that waste oil is not flushed into the sewer system, but is collected separately and carted off site as necessary. Petitioner has taken a number of steps to improve

pedestrian safety. Driveways have been narrowed, and sidewalks have been textured to alert pedestrians. Entrances will be provided on the east and south sides of the structure. The predominate flow of the people coming out of the Metro Station is directly to the shopping center through the pedestrian bridges, which will reduce pedestrian traffic across the proposed Wendy's driveways. He pointed out that there has not been a claim against DavCo for the last 15 years arising out of a pedestrian/vehicular accident, as confirmed by DavCo's risk manager, Stacey Jackson, in a letter dated July 14, 2006 (Exhibit 36).

Mr. Porter felt that DavCo's operation, particularly the drive-through and the turning movements on the site, would not be dangerous or adversely affect the general health, safety and welfare; nor would it cause objectionable fumes or odors.

3. John Sekerak (Tr. 45-105):

John Sekerak testified as an expert in land use planning. He described the subject site as flat and vacant (the gas station having been removed), with a six foot fence surrounding it. The curb cuts from the gas station remain.

Mr. Sekerak described the plan for the new Wendy's. The customer entrance consists of two doors, one oriented towards Veirs Mill Road and the other towards the mall entrance road. There are three driveway access points – one right-in, right-out access on the northern edge of the property along Veirs Mill Road, and two 14-foot wide driveways, one right-in and one right-out, along the mall's entrance road on the south side of the site. The drive-through cashier and pickup windows are located on the west side of the Wendy's restaurant, on the opposite side from Veirs Mill Road. Delivery trucks will use the Veirs Mill Road entrance, but will only visit during non-patron hours.

Mr. Sekerak praised the addition of the fence along Veirs Mill road and the pedestrian bridges as having rerouted a great deal of pedestrian traffic, and by his observation, having reduced the pedestrian traffic across the intended Wendy's driveways. The narrowed (14 foot wide) driveways

also increase pedestrian safety. Mr. Sekerak also noted that providing a street orientation for the restaurant to Veirs Mill Road was a “real enhancement.” At the front door entrance area there is a raised crosswalk, directly connecting to Veirs Mill Road. That raised crosswalk, by its paving patterns, visually identifies it as a pedestrian way. Also the raised element of it is a traffic calming, so as cars enter the site they'll be going at a very slow rate. Tr. 54-57. There is also a three-foot high masonry wall along the Veirs Mill Road frontage which helps steer pedestrians into the entrance on the Veirs Mill side. It also screens the fronts of the cars, and the materials and colors will coordinate Wendy's masonry architecture and those found in the WMATA garage and some of Westfield's architectural elements.

Mr. Sekerak explained exhibit (24(c)), which utilizes industry standard software to show that a single unit, 30-foot wheel base, truck, could enter the site, maneuver, and exit the site.

The site lighting is designed for safety. There are four 20-foot high poles located on the site, with strategic locations to provide good site lighting covering the entire site. The plan is to have one pylon sign at the southeast corner of the property.¹⁵ Although a permit will be required, the new sign should be grandfathered in as part of Westfield's overall sign approval package for Westfield Mall, as a whole. Petitioner will provide shade trees, ornamental trees, ornamental shrubs, and some supplemental planting along the western side of the property, in addition to the existing landscaping there. A bike rack will be located near the front door of the property, as labeled on the site plan.

The subject area of the special exception extends a bit outside the property line for Lot N-621, on land also owned by Westfield. The area of the special exception is denoted on the Site Plan by a dashed line, and the property line of the lot is designated by a long line with two dashes, intermittently.

On the northwest corner of the site is a six foot high masonry trash enclosure with swing

¹⁵ Some of these plans were modified after the hearing to address concerns raised by Technical Staff. For example, the pylon sign was eliminated from the plans, and two signs along the masonry wall were substituted.

doors. Grease and oils will be carted out from the receiving area and stored there for regular pick up. Along the Veirs Mill Road side there will be a trellis, with green vines to help soften and provide additional green treatments and live plants in this urban environment.

The nearest residences to the site are multi-family residences, at the northeast corner of the intersection of Georgia Avenue and Pritchard Road, and they are about 400 feet away, on the other side of Veirs Mill Road and Georgia Avenue. The nearest single-family, detached home is on the other side of Amherst Avenue, about 900 feet away. This site is within a very large regional mall. It's along major roadways of Veirs Mill Road, very near a very large intersection with Georgia Avenue. The bus Metro station area is directly across the street. A four-story large parking garage is directly to the north of our property. There is a lot of surface parking, a Bally's Fitness Club and other retail uses. This is not residential in character, and the use would not cause any glare or other disturbing factors into any residential zone because of the distance and the nature of the activities surrounding it. Tr. 73-75.

Mr. Sekerak testified that the applicant is requesting two parking waivers. The first one pertains to §59-E-2.71, and that requires a 10 foot wide set back of parking facilities to public right of way. Petitioner is proposing "a superior alternative," a four foot strip, with a masonry wall, which is a more urban treatment than a 10 foot wide landscape strip with a hedge. According to Mr. Sekerak, this waiver is common in the CBD, as discussed in the Zoning Ordinance. The masonry wall would run along the entire frontage of Veirs Mill Road from the south side of the vehicular entrance, broken only by enlarged piers at the pedestrian entrance. The masonry wall also wraps around the south side, adjacent to the mall entrance road. The four-foot strip will pull the building closer to the street, and the three foot high masonry walls replaces what otherwise would be a three foot height hedge. It has the added benefit of clearly demarcating pedestrian routes. The elements used in that wall, the cast

stone caps, etcetera, will be compatible with other treatments in the mall, the overpass and the architecture of the WMATA parking garage.

The second parking waiver request regards §59-E-2.72, a parking requirement for a four-foot wide landscape strip between the parking facility and the property line. In this case, all property lines are paper property lines, since all the land is under common ownership, and the parking facilities may or may not be set back from these property lines under common ownership. Petitioner requests that there be no setback, and the owner agrees. According to Mr. Sekerak, when there is common ownership of adjoining lots in commercial zones, eliminating this setback is “a fairly common practice even without a waiver.” The landscape slope along the west side of the property is more than effective. It accomplishes the purposes of that four foot setback. Petitioner will be buffering this parking compound from the balance of the larger parking compound for the regional mall with an interruption of some evergreen plantings in that area. Even the single row of evergreen trees is an effective buffer, and Petitioner will further supplement that. In Mr. Sekerak’s opinion, in both of these instances, the parking waivers are justified by better site design and street orientation with superior treatments, and the result will be better than what the minimum requirements of the zoning ordinance would otherwise require.

For storm water management, Petitioner will provide an underground water quality facility, which will discharge directly to the public storm drain system that is part of Veirs Mill Road. Quantity controls and recharge are not necessary because of the nature of this redevelopment. The storm water management concept plan has been approved by DPS. The property is exempt from forest conservation requirements under Chapter 22a, and is served by public water and sewer, designated W-1 and S-1.

Mr. Sekerak described his definition of the neighborhood. To the north of the subject property, it ends at Reddie Drive, and then Georgia Avenue is the limitation to the east down to its

intersection with Veirs Mill Road. The neighborhood goes to the west following the C-2 zoning line, and a meandering delineation going through the C-2 zone, which varies from as little as 400 feet from the property to up to 800 feet from the property. It doesn't look like it makes a lot of sense on the zoning map, but it does reflect some of these larger stores that have front entrances with direct relationship and visual connection to the subject property within the regional mall. Tr. 83-84.

His definition differs from Technical Staff's which ended to the west at the mall ring road, but on the east extended to include multi-family dwellings on the east side of Georgia Avenue. Mr. Sekerak observed that, even though Technical Staff ended on the west at that fairly minor vehicular demarcation area, on the east, it crossed the 7 lanes of Veirs Mill Road, the WMATA bus depot and Georgia Avenue, to include the block on the other side of Georgia Avenue. Mr. Sekerak found that "rather inconsistent in terms of the orientation of the uses, the commonalities of the users, any visual connection etcetera that they would depart so far to the west and being inconsistent with how they defined it to the east." Tr. 85. Moreover, the Bozzutto air rights development at the location of the bus depot would certainly eliminate any of the visual connections between the properties east of Georgia Avenue and the site.

According to Mr. Sekerak, the Master Plan does not specifically discuss this property, but it does identify that those uses between Veirs Mill Road and the mall ring road should be office and/or retail uses. The proposed commercial use would replace the previous service use as gas station, advancing the sector plan in that regard. The sector plan recommends this area for the C-2 Zone. In the C-2 Zone, a drive-through restaurant is a permitted use by special exception. If it did not have the drive-through, it would be a permitted use.

In the purpose clause of the C-2 zone, it identifies that C-2 Zones are found in central urban commercial areas, and these areas inherently have a relatively high degree of pedestrian activity, as opposed to a more suburban context. Mr. Sekerak feels that this site has a relatively low level of

pedestrian activity since “pedestrians along here aren't doing comparison shopping strolling around the street.” They are accessing the regional mall and from the pedestrian alternatives exhibit, they have any number of far superior routes in terms of safety and convenience.

Although Petitioner will be providing safe and appropriate pedestrian circulation around the site, this isn't part of the primary pedestrian fabric of the Wheaton CBD area, as shown on page 39 of the Sector Plan. He noted that the WMATA garage, which obviously is oriented toward vehicular use, is on the same side of Veirs Mill as the subject site, while the pedestrian way is shown to the east of Veirs Mill in the Sector Plan. In his opinion, the subject use and the site plan are consistent with the Sector Plan, contrary to Technical Staff's opinion. Tr. 89-91. Mr. Sekerak believes Technical Staff would probably like to eliminate drive-through restaurants in all urban areas, and therefore in C-2 zones, even though the Zone permits them by special exception. He also opined that the subject site will be “the most pedestrian friendly drive through restaurant in Montgomery County.” In his opinion, “this is a fabulous location for a drive through restaurant. Vehicular access is convenient and safe and we've designed a site that provides that interplay with pedestrians so there are minimization of conflicts.” Tr. 92-93.

Mr. Sekerak noted that the Master Plan also recognizes the vehicular orientation of the regional mall context, stating on page 21, that driving to and within Wheaton is pleasant, and parking is available for those needing to travel by car. He stated that, in addition to accommodating the pedestrians, for the patrons coming to the site, on-site parking and a circulation for the drive-through will be provided. All of those interplay, and Petitioner has come up with a very efficient layout that brings the restaurant with a direct relationship to the street. Mr. Sekerak does not believe the site design can be improved by a remand to Park and Planning. The urban design people from Park and Planning have already been involved, and according to Mr. Sekerak, “There are no design solutions

that bring the building to the street frontage and yet still provide safe access, parking and a drive through.” Tr. 97-98.

Mr. Sekerak opined that the proposal satisfies all the dimensional requirements of the zone, which are listed on the site plan, and it is in harmony with the character of the surrounding neighborhood and will actually enhance its character. It will not be detrimental to the use, enjoyment and development of surrounding properties, and it is complimentary to the mall in terms of land use and design. It will not cause any objectionable conditions to exist, and in that regard, is certainly an improvement over the previous gas station use. It's a safe, secure and well designed facility and an ideal location for this use. It'll not adversely affect the health, safety and welfare of employees or visitors. It actually provides a benefit by providing local jobs and a convenient dining option. It will be served by adequate public facilities, existing public water and sewer and storm water management. It doesn't compromise the access or visibility to the mall in terms of that access point or the ring road. It is an excellent site design for a drive-through restaurant, which uses measures that would minimize the disruptions to pedestrians moving past the site and allows those to occur in a safe manner. Tr. 100-102.

In Mr. Sekerak's opinion, the parking waivers will achieve the goals for which those setbacks were originally set forth in the parking ordinance, and through the use of the landscape area to the west of the site and the masonry wall along the frontage, he believes it will be a superior treatment to that which would otherwise be required in the zoning ordinance.

Zoning Ordinance §59-G-2.16(d) is not applicable because the use itself does not abut a residential zone, even though the C-2 zone that it's in abuts a residential zone.

As to §59-G-2.16(e), there will be no product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or at entrances and exits to and from such use are prohibited. The parked vehicles are buffered by the wall as required in the zoning ordinance. There

are ample setbacks from the right-of-way to the intersection of the public road and the private mall entrance road. It is a fully signalized intersection with wonderful pedestrian signals, lighting, countdowns, and audible components.

As to §2.16(f), the lighting will not reflect or cause glare into any residential zone. There are no qualitative limitations in terms of the intensity of the lighting, but the lighting on this site should be, and will be well lit for safety purposes.

As to §2.16(g), a lot on the corner of the access road may not technically be a corner lot, but in any event, the first driveway is setback more than 20 feet, so it complies with the spirit and letter of (g). Tr. 102-105.

4. Thomas Flynn (Tr. 108-118):

Thomas Flynn testified as an expert in market analysis. In his opinion, a need exists for the proposed use due to an insufficient number of similar uses presently serving population concentrations in the county as a whole, and the proposed use will not result in saturation of similar uses in the surrounding area. His testimony is summarized on page ES-1 in his “Market Need Study” (Exhibit 11).

Mr. Flynn concluded that there's a need for two or three drive-through or drive-in restaurants in the study area. In his opinion, most developers would avoid any type of situation for this kind of restaurant which didn't have a drive-through capability. It's just not economically feasible without a drive-through, given the land prices in the area.

Mr. Flynn defined the area for the market as a four minute drive time. A longer drive time would result in a bigger area and therefore more need, but also more competitors. In his opinion, this four minute period yielded the correct balance of population and restaurants where customers can go at present.

5. Robert Saunders (Tr. 119-128):

Robert Saunders testified as an expert in architecture. He stated that the proposed building is a culmination of many, many changes, all brought about by “outside forces” such as the building departments, planning boards and the landlord. Changes on the inside have to do with the operation of the building. On the outside, one of the things that's happened is the building has grown in height considerably. It's over 20 feet high now to give it the mass and the background it needs. The facia, which used to be yellow, has been mellowed; it's gone to copper, which is very compatible with any surrounding. The building has gone to a complete masonry, which gives flexibility in matching surrounding buildings and surrounding neighborhoods, and the lighting accents but doesn't detract from the building.

In Mr. Saunders' opinion, this particular model “is the best we've got right now.” It is a very compatible and flexible building, and it will be very attractive. It will fit well in the context of the surrounding area. Exhibit 38 generally gives a sense of what the building will look like, and Exhibits 42 and 43 show elevations depicting what the building will look like and the materials that will be used in the construction of the building.

6. Glenn Cook (Tr. 128-147):

Glenn Cook testified as an expert in traffic engineering and transportation planning. Mr. Cook stated that he contacted the Park and Planning staff, who provided an outline of the study area and gave him information about other developments that have approval in the area, where traffic is not on the road system at this time, but will be in the future. He collected existing traffic data, which included vehicle turning movements and pedestrian counts in this particular case, and made projections for traffic to be generated. He then combined them with projections for what a fast food restaurant of this size would generate, assigned that traffic to the road system and analyzed the entire

road network. In this area of the county the congestion standard is 1800 critical lane volumes. He found that all of the study area intersections would be operating below that 1800 threshold.

Mr. Cook noted that the national standards say that approximately 50 percent of the traffic to a fast food restaurant will come from the existing traffic along the roadways. Many people on the road network for another destination choose to stop by and grab something to eat and continue on their way. So they do not represent a new trip or a destination trip that's being attracted to that site. In this particular case, where this property is located right at the mall and near to the Metro station, he believes that percentage would even be a little bit higher, but he used the national averages, for the purposes of the study, and assumed that 50 percent of the traffic would be "pass-by traffic." He feels that his projection is therefore a conservative one.

Pedestrians were counted during the time periods that he counted cars, which is 6:30 to 9:30 a.m. and 4 to 7 p.m. He found that 75 pedestrians would be in the intersection during the morning peak hour, and 84 during the evening peak hour. Mr. Cook testified that, in a CBD or an area like it, you're going to have pedestrian vehicular conflicts no matter what use you had on this site. Through meetings with the County and Park and Planning, this site has been made as pedestrian friendly as possible.

There's no way to eliminate those conflicts in an area such as this. But there are certain enhancements that you can make to improve the safety and make the motorists aware that there are driveways there, or pedestrians there, and likewise let the pedestrians know that there are crossings for vehicular traffic. He feels that Petitioner made all the enhancements that it possibly could to increase pedestrian safety. The treatments that are reflected on the site plan are the most that you can do to make pedestrians and drivers aware of the situation. In Mr. Cook's professional opinion the transportation network in the surrounding area is adequate to accommodate the proposed use. Also, the system and circulation are safe, adequate and efficient for the proposed use.

Mr. Cook described a traffic problem at the intersection of Georgia Avenue and Veirs Mill. Traffic occasionally backs up, not so much because of volume, but sometimes people coming southbound on Georgia Avenue make a sort of U turn onto Veirs Mill going northbound, and then try to squeeze into the turn lane to make a left. He indicated that was not a problem generated by Petitioner, and should not be made worse by its plans.

Mr. Cook also testified that there is nothing more inherently unsafe about a drive-through restaurant than a drive-in restaurant in terms of pedestrian crossings such as exist in this case. He suggested that Technical Staff may be referring to the fact that a fast food restaurant with a drive-through window generates a little more traffic in the peak periods than what a restaurant would without the drive-through. It is purely quantitative thing. He therefore compared the numbers generated by the two types of restaurants in Exhibit 45. He also compared those numbers with a 1,000 square foot larger, non-drive-through restaurant, based on Mr. Alessi's projection that if a drive-through were not permitted on the site, the restaurant would have to be about 1,000 square feet larger to generate more volume. In that case the non-drive-through restaurant would actually generate more traffic and thus potentially more pedestrian/vehicle conflicts. Tr. 143-145.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner

concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a drive-in restaurant. Characteristics of the proposed drive-in restaurant use that are consistent with the “necessarily associated” characteristics of drive-in restaurant uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with drive-in restaurant uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with a drive-in restaurant include (Exhibit 21, Appendix p. i):

a building to house the restaurant; vehicular entry and exit lanes and cars utilizing those lanes; either parking spaces where patrons are served food, or drive-through lanes where patrons pick-up food; deliveries and pick-ups associated with the use; employees; patrons (who arrive in cars); high levels of on-site activity including traffic; lighting sufficiently bright to allow for the outdoor activities (eating in car, picking up food in car); trash and noise levels commensurate with a use with exterior activities; trash receptacles; and activities associated with managing the fats, oils, and grease generated by types of food and cooking methods used.

Technical Staff also spelled out possible non-inherent characteristics of any drive-in restaurant site (Exhibit 21, Appendix p. i):

Non-inherent characteristics include location; pedestrian activity and levels at the site and in the vicinity of the site; pedestrian patronage of the use; scale; features of a non-drive-in eating and drinking establishment including indoor seating area for patrons and parking for those indoor patrons; construction and design materials; hours of operation (although drive-ins often have long hours of operation); and type and design of signage (although drive-ins often have large, bright signs so that the use is visible from the road); and features unique to the site.

Finally, Technical Staff described the non-inherent characteristics of the subject site (Exhibit 21, Appendix p. i):

The non-inherent features of the subject application are its location between a Metro Station/bus depot and a mall in an urban area with many pedestrians and where pedestrian activity is sought and encouraged and pedestrian levels are high; and several additional features characteristic of a non-drive-in restaurant, namely an indoor seating area for patrons and on-site parking for such patrons.

The Hearing Examiner accepts this breakdown as a reasonable description of the inherent and non-inherent characteristics of drive-in restaurants and of the subject site. However, the Hearing Examiner disagrees with Technical Staff's conclusion that these characteristics of the site warrant denial of the petition. For all the reasons spelled out in Parts II.F. 3 and 4 of this report, the Hearing Examiner finds that issues regarding pedestrian safety have been sufficiently addressed by Petitioner, in conjunction with M-NCPPC's Transportation Planning Division, to protect the public, and that denial of the petition is not called for. Instead, the Hearing Examiner has recommended a reporting

requirement which will allow the Board to monitor and remedy any safety problems that develop with regard to pedestrians accessing the site.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff reports, the other exhibits and the testimony of the Petitioner's witnesses provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A drive-in restaurant use is a permissible special exception in the C-2 Zone, pursuant to Code § 59-C-4.2(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.16 for a drive-in restaurant use, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The property is located within the area covered by the *Comprehensive Amendment to the Sector Plan for the Wheaton Central Business District and Vicinity*, approved and adopted September 1990. For all the reasons discussed at length in Part II. F. 1. of this report, the Hearing Examiner finds that the planned use is consistent with the applicable Master Plan.

(4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because it will be a commercial use in a commercial zone and will be designed to reflect the streetscape features recommended for the Wheaton CBD, which it borders, as discussed more fully in Part II. F. 2. of this report. The proposed use will generate additional traffic and parking, as discussed in Parts II. B, C and D of this report, but that additional traffic will not raise traffic congestion at affected intersections to unacceptable levels, and Petitioner will provide all the on-site parking required by the Zoning Ordinance. Thus, the subject use will be in harmony with its surroundings. There are no similar uses in the general neighborhood.

(5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. The surrounding properties are a WMATA garage, a WMATA bus depot, a surface parking lot and the Westfield Shoppingtown Wheaton Mall, which is owned

by Petitioner's landlord. The proposed use will be designed to fit in with the surrounding uses, including the Wheaton CBD streetscape, as discussed in Part II. F. 1 of this report.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Given its location and the nature of the proposed use, no objectionable noise, vibrations or dust will be generated. Harry Porter, DavCo's project manager, testified that the use will not produce any noise, fumes, odors or other activities that would be bothersome to the surrounding neighborhood. Tr. 43. Issues relating to lighting have been resolved, as discussed in Part II. F. 5 of this report. The Hearing Examiner finds that Petitioner will be compliant with this section.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: This section is inapplicable since the area is not residential.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Environmental issues relating to removal of the underground gasoline tanks installed by the previous user have been resolved, as evidenced by a letter from the Maryland Department of the Environment indicating that the underground gasoline tanks had been successfully removed from the site, and that all the remediation that needed to be

done for the gas station has been accomplished. See Exhibit 46. Pedestrian/vehicular issues have been discussed at length in Parts II. F. 3 and 4 of this report. The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Petitioner's land use expert testified that there were adequate public facilities serving the site in question, as discussed in Part II. D. of this report.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review,¹⁶ as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review ("LATR"). As discussed in Part II. D. of this report, the proposed use clearly complies with LATR standards. Water, sewer and other services are all available at the subject site. Given the nature of the special

¹⁶ Policy Area Transportation Review (PATR) was eliminated in the 2003-2005 Annual Growth Policy-Policy Element, and therefore is inapplicable.

exception, it will have no impact on school capacity. Therefore, the Hearing Examiner concludes that the use will be served by adequate public facilities.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: The safety of pedestrian and vehicular traffic is discussed at length in Parts II. F. 3 and 4 of this report. Based on a preponderance of the evidence, the Hearing Examiner finds that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic, if the recommended conditions are followed.

C. Specific Standards

The testimony and the exhibits of record, including the Technical Staff reports, provide sufficient evidence that the specific standards required by Section 59-G-2.16 are satisfied in this case, as described below.

Sec. 59-G-2.16. Drive-in restaurants.

A drive-in restaurant may be allowed, upon a finding, in addition to findings required in division 59-G-1, that:

- (a) *The use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.*

Conclusion: For the reasons discussed in response to §59-G-1.21(a)(6) in Part V. B. of this report, the proposed use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.

- (b) *The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across*

sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.

Conclusion: The issue of traffic safety was discussed at length in Parts II. F. 3 and 4 of this report.

Considering the entire record in this case, the Hearing Examiner finds that the use at the proposed location will not create a traffic hazard or traffic nuisance for any of the reasons set forth in this section. In addition, a reporting requirement has been proposed as a condition to allow the Board to monitor on-site pedestrian safety.

(c) The use of the proposed location will not preempt frontage on any highway or public road in such manner so as to substantially reduce the visibility and accessibility of an interior commercial area zoned or proposed for commercial use which is oriented to the same highway or public road.

Conclusion: This use will not preempt frontage or reduce visibility of an interior commercial area.

The mall access road will continue to serve as a primary entrance to the mall, and the proposed use does not compromise access to or visibility of the mall or any other commercial use. Tr. 101.

(d) When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot wide planting strip on the outside of such wall or fence, planted in shrubs and evergreens 3 feet high at the time of original planting and which shall be maintained in good condition. Location, maintenance, vehicle sight distance provisions, advertising and parking areas pertaining to screening shall be as provided for in the requirements contained in article 59-E.

Conclusion: This section is not applicable because the use itself does not abut a residential zone, even though the C-2 Zone that it is in abuts a residential zone.

(e) Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or at entrances and exits to and from, such use are prohibited.

Conclusion: The proposed use will not have product displays, parked vehicles or other obstructions which adversely affect visibility at intersections or at entrances and exits to and from the use. The parked vehicles are buffered by the masonry wall as required in the Zoning Ordinance. There are ample setbacks from the right-of-way to the intersection of the public road and the private mall entrance road. Tr. 104

(f) *Lighting is not to reflect or cause glare into any residential zone.*

Conclusion: The proposed lighting will not reflect or cause glare into any residential zone, as the subject site is far away from the nearest residential zone and is buffered by two major roads, Veirs Mill and Georgia Avenue.

(g) *When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot, as defined in section 59-A-2.1, and such driveways shall not exceed 25 feet in width; provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 60 feet from the centerline of any abutting street or highway.*

Conclusion: There is some question as to whether a lot on the corner of the access road to a shopping mall is considered a corner lot, but if it is, the first driveway is setback more than 20 feet and does not exceed 25 feet in width, so it complies with this section. Tr. 104-105.

D. Additional Applicable Standards

59-G-1.23. General development standards.

(a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Mr. Sekerak opined that the proposal satisfies all the dimensional requirements of the

zone (Tr. 100), and Technical Staff agrees, as demonstrated by the following matrix from the initial Technical Staff report (Exhibit 21, p. 13):

DEVELOPMENT STANDARD C-2 ZONE	REQUIRED/ PERMITTED	PROVIDED (per development standards table on revised s.e. site plan rec'd 6/14/2006)	COMPLIANCE
Building Height (59-C-4.351)	3 stories/ 42 feet max.	1 story/19'-3"	Yes, 1 story/approx.20 feet, per staff measurement from elevations rec'd by staff 6/14/2006
Floor Area (59-C-4.352)	1.5 FAR max. (18,750 s.f. x 1.5 = 28,125 s.f. GFA)	0.14 FAR of Lot (2552 s.f. GFA), 0.11 FAR of SE area	Yes, FAR is <1.5, per staff measurement from revised s.e. site plan rec'd 6/14/2006
Front Setback (59-C-4.353)	10 feet min.	43 Ft. approx.	Yes, per staff measurement from revised s.e. site plan rec'd 6/14/2006
Side and Rear (59-C-4.353)	0, but min. 3' if provided	Min. 15'	Yes, per staff measurement from revised s.e. site plan rec'd 6/14/2006
Green Area (59-C-4.354)	10% min. (2254.5 s.f.)	20% of lot (3750 s.f.), 23.9% of SE Area (5417 s.f.)	Yes, >10%, per staff measurement from revised s.e. site plan rec'd 6/14/2006

(b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As noted in Part II. B. of this report, Petitioner will provide all the parking spaces (23) required by Zoning Ordinance §59-E, as confirmed by Technical Staff. Exhibit 62, p.6.

(c) *Minimum frontage* * * *

Conclusion: Not applicable to this special exception.

(d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Not applicable. The use is exempt per Exhibit 7(b).

- (e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable. Petitioner's storm water management concept plan has been approved by the Department of Permitting Services (DPS), in a letter dated August 18, 2005, a copy of which is attached to Exhibit 21.

- (f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: Technical Staff has reviewed and approved the signage proposed for the site. Exhibit 62. p.2. According to Westfield's representative, Anthony Alessi, there is a comprehensive signage plan for Westfield's property at the mall, which is recognized by the County. Tr. 72. Nevertheless, since Petitioner will be deviating from the previous sign footprint, they will have to obtain a permit from DPS. A condition is therefore recommended requiring a permit prior to the posting of any sign.

- (g) *Building compatibility in residential zones. . . .*

Conclusion: Not applicable. The site is not in a residential zone.

- (h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The site is not in a residential zone, nor does it produce any light that will intrude into a residential zone.

59-G-1.25. County need.

In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

(1) Eating and drinking establishments—Drive-in restaurant.

Conclusion: Since the Zoning Ordinance requires a showing of “County need,” to qualify for a “drive-in restaurant” special exception, Petitioner produced a market analysis by Thomas Flynn, an expert in the field. In his opinion, a need exists for the proposed use due to an insufficient number of similar uses presently serving population concentrations in the county as a whole, and the proposed use will not result in saturation of similar uses in the surrounding area.¹⁷ Tr. 108-118. His testimony is also summarized on page ES-1 in his “Market Need Study” (Exhibit 11).

Mr. Flynn concluded that there is a need for two or three drive-through or drive-in restaurants in the study area. In his opinion, most developers would avoid any type of situation for this kind of restaurant which did not have a drive-through capability. It is just not economically feasible without a drive-through, given the land prices in the area. According to Petitioner’s project manager, Harry Porter, DavCo selected this site because there is a need for a quick service restaurant in this area, based on the projected growth in population and businesses and workers in the area. Tr. 27.

¹⁷ Mr. Flynn defined the area for the market as a four minute drive time. A longer drive time would result in a bigger area and therefore more need, but also more competitors. In his opinion, this four minute period yielded the correct balance of potential consumers and the restaurants available to accommodate them. Tr. 108-118.

Technical Staff reviewed and approved Mr. Flynn's study, concluding that "applicant has met his burden of proof." Exhibit 21, p. 13 and January 26, 2006 memorandum attached thereto from Research and Technology staff. There is no evidence to the contrary, and the Hearing Examiner therefore finds that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the use at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood.

59-G-1.26. Exterior appearance in residential zones.

* * *

Conclusion: Not applicable. The site is not in a residential zone.

Based on the testimony and evidence of record, I conclude that the drive-in restaurant use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2664, seeking a special exception for a drive-in restaurant use at 11030 Veirs Mill Road in Silver Spring, Maryland, and waiver of parking regulations contained in Zoning Ordinance §§59-E-2.71 and E-2.72, be GRANTED, with the following conditions:

1. Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. Petitioner shall provide 23 parking spaces on site.

3. The special exception will operate with a maximum of 50 employees, up to 10 of whom may be present at the same time.
4. Petitioner must provide streetscaping and landscaping as specified in its revised site plan (Exhibit 64(a)) and its revised landscape and lighting plan (Exhibit 64(b)), including the full “Wheaton Streetscape” along street frontages, in accordance with the current Wheaton CBD Streetscape Standards.
5. Total interior floor space of the use is limited to 2552 square feet, no more than 917 square feet of which may be devoted to a patron area, and the structure should be designed in accordance with architectural plans submitted in this case.
6. The maximum hours of operation will be from 6:00 o’clock in the morning until 10:00 o’clock in the evening, with the drive-through window open until 2:00 o’clock in the morning, seven days a week.
7. Petitioner shall provide adequate security for the site’s late night operation to ensure that there are no gatherings of large, unruly groups at the site. This security force may be provided by Petitioner and/or Westfield.
8. Petitioner may not post the signs it proposes until it obtains a permit therefor from DPS. A copy of the permit should be filed with the Board of Appeals.
9. Petitioner shall submit an annual report to the Board of Appeals detailing any vehicle/pedestrian accidents on the site during the preceding year. The first such report shall be due one year after the use becomes operational. If no accidents have occurred, the report should still be filed, so indicating. These reports shall identify the date of any such on-site accident, the names of the involved parties, the nature of any injuries, the precise location of the accident, a brief description of the circumstances and a suggested remedy from Petitioner for any dangerous conditions that are revealed. Petitioner should attach a copy of related police

accident reports to its filings. A copy of Petitioner's reports should also be filed with the Office of the People's Counsel and M-NCPPC's Transportation Planning Division, which shall submit remedial recommendations to the Board of Appeals within one month of receiving any report revealing one or more vehicle/pedestrian accidents. The Board shall retain jurisdiction over this matter to review these annual reports and determine what action, if any, is necessary to insure reasonable safety to pedestrians on the subject site.

10. Petitioner shall keep dumpsters and outdoor storage areas for waste, fats, oils and grease covered and located as far from the storm drain inlets as possible.
11. Petitioner should submit a fat, oil and grease (FOG) control plan outlining best management practices (BMPs), and a waste handling and reduction plan to M-NCPPC's Environmental Staff, prior to release of building permits.
12. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: April 23, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner